Petition

81-525

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES V. BOWEN, *Petitioner*

v.

UNITED STATES POSTAL SERVICE
and
AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Respondents

Petition for a Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a union, whose adjudicated breach of its duty of fair representation caused a loss of wages beyond the loss that would have occurred if the union had fulfilled its duty, may be required to pay as compensatory damages the amount of the wage loss caused by the union's fault.

II. Whether this court should exercise its supervisory powers in the interests of justice to restore petitioner's full award of damages where that award has been substantially reduced by the Fourth Circuit's belated and erroneous ruling that petitioner should have appealed from a judgment in his favor in order to contest the district court's apportionment, among the culpable wrongdoers, of petitioner's uncontested damages.

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UNITED STATES POSTAL SERVICE
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Petition for a Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

Charles V. Bowen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The unreported judgment order and findings of fact and conclusions of law of the United States District Court for the Western District of Virginia, which were entered on May 11, 1979, are attached to this Petition as Appendices B and C. The opinion of the United States Court of Appeals for the Fourth Circuit, attached as Appendix A, is reported at _____ F.2d _____, Nos. 79-1455 and 79-1464 (4th Cir., decided February 23, 1981, as rewritten July 7, 1981).

JURISDICTION

The original judgment of the Fourth Circuit was entered on February 23, 1981. Timely petitions for rehearing and suggestions for rehearing *en banc* were filed on April 8, 1981, pursuant to an order of the Fourth Circuit extending the time for filing such petitions until April 9, 1981 (copy of order attached as Appendix E), and were denied by the Fourth Circuit in an order dated May 29, 1981 (copy of order attached as Appendix F). On June 8, 1981, the United States Postal Service moved the Fourth Circuit for a stay pending the filing of a petition for a writ of certiorari. The Fourth Circuit granted this motion and, in an order filed June 29, 1981, stayed its mandate for 30 days (copy of order attached as Appendix G).

On July 7, 1981, the Fourth Circuit issued a "rewritten" page 7 of its opinion of February 23, 1981, adding footnote 6 on page 7 of the slip opinion. (A copy of the transmittal letter from the Clerk dated July 7, 1981, is attached as Appendix H). Petitioner Bowen filed a petition for rehearing and suggestion for rehearing *en banc* on July 21, 1981, within 14 days of the issuance of the rewritten opinion of the Fourth Circuit. The Fourth Circuit has not yet acted on this petition.[1]

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a), provides:

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[1]Due to the unusual nature of the Fourth Circuit's proceeding in this case—the reissue on July 7, 1981, of its opinion of February 23, 1981—petitioner is uncertain whether his petition for a rehearing filed on July 21, 1981, was "timely" so as to toll the period for filing a petition for a writ of certiorari in this Court. If calculated from the denial on May 29 of the first petitions for rehearing, that period expires on August 27, 1981. Petitioner has therefore filed now to insure timely filing. Petitioner will notify the Clerk of this Court immediately upon receipt of notice of the Fourth Circuit's disposition of his outstanding petition for rehearing.

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

(a) The Parties

Petitioner Charles V. Bowen ("Bowen" or "petitioner") was employed by respondent United States Postal Service ("Postal Service") from April, 1974 until his discharge on March 30, 1976. Respondent American Postal Workers Union ("Union") was Bowen's collective bargaining representative.

(b) The Facts

Petitioner's complaint alleged that his dismissal by the Postal Service was without just cause and violated the collective bargaining agreement and that the Union failed fairly and adequately to represent him in the ensuing grievance process. The action was brought pursuant to §301 of the Labor Management Relations Act, 29 U.S.C. §185, §9(a) of the National Labor Relations Act, 29 U.S.C. §159(a), and 28 U.S.C. §1337.

The evidence adduced before the trial court showed that Bowen's supervisors and fellow employees constantly harassed him on the job. Bowen was the brunt of jokes and was referred to as a homosexual, and it was suggested to Bowen that he was mentally retarded. Bowen's supervisor often stated publicly that he was going to "get rid of" Charlie Bowen. On February 21, 1976, Bowen had been so harassed and badgered by a particular employee that Bowen asked to be relieved from work so that he could go home. As he was leaving the building, Bowen and that employee met by chance in a stairway, exchanged words, and scuffled briefly. Neither individual was seriously hurt, and neither thought the matter was worth reporting.

Following this incident, the Postmaster suspended Bowen pending the completion of an investigation. On March 15, 1976, the Postmaster notified Bowen by letter that he proposed to dismiss Bowen for three reasons:

1. the alleged "assault" on February 21, 1976;
2. failure to report for and pass a qualifying test within thrity days from January 31, 1976; and
3. failure to report for another qualifying test by April 2, 1976.

As to the first stated reason, the other employee involved in the incident in the stairway testified at trial that it should not have been the basis for Bowen's discharge. As to the second reason, evidence presented at trial showed that during the latter portion of the thirty-day period, the Postal Service had physically prevented Bowen from appearing on Postal Service property. As to the third reason, the specified period still had eighteen days to run as of the date of the Postmaster's letter, and evidence presented at trial showed that in fact Bowen passed the test before the period expired.

On March 30, 1976, the Postmaster terminated Bowen, who then filed a grievance with the local Union. The local Union president himself investigated the February 21, 1976, incident and took tape-recorded statements. The local Union president's investigation disclosed evidence, later adduced at trial, showing that Bowen had long been the subject of unwarranted and harsh treatment and constant harassment and ridicule by both his fellow employees and his supervisors. The Union president also determined that Bowen's principal supervisor had frequently said he was going to "get rid of" Bowen.

The Union representatives involved at each step of the grievance process recommended Bowen's case for further pursuit. Ultimately, a Union official recommended to the Union's national office, where decisions concerning arbitration were made, that the grievance be certified for arbitration. The file transmitted to the Union's national office included a notation that the statements that the local Union president had tape-recorded should be listened to

because they called attention to serious inconsistencies in the Postal Service's case against Bowen.

By the time, however, that a single national Union official got around to reviewing Bowen's file to decide whether to request arbitration, the contractual time limit for requesting arbitration had expired. The official, who was supposedly working under a brief, unwritten extension of time granted by the Postal Service, faced a substantial backlog of similarly overdue cases. At trial, this official admitted that he spent only fifteen to thirty minutes reviewing Bowen's file and admitted that he did not listen to the tapes of witness interviews to which his attention had specifically been called. This national official further testified that he disregarded numerous comments in the grievance file by lower ranking Union officials who questioned the propriety of Bowen's discipline and recommended the case for arbitration.

The national Union official refused to recommend Bowen's case for arbitration—and, in fact, summarily rejected arbitration for *all* cases he reviewed that day. The action of the national Union effectively barred Bowen's opportunity to get relief through the arbitration process. (A15.) Bowen then filed this suit.

(c) The Judgment in the District Court

Because of the quasi-governmental character of the Postal Service, the trial court was by statute the finder of fact as to it. A jury was impaneled as finder of fact as to the Union, and the same jury also sat in an advisory capacity as to the Postal Service.

On a special verdict form (a copy of which is attached as Appendix D), the jury found that the Union, as Bowen's bargaining representative, had breached its duty of fair representation to Bowen (Jury finding No.1, A21); that the Postal Service had discharged Bowen without just cause in violation of the collective bargaining agreement (Jury finding No.2, A21); and that both the Union and the Postal Service had acted "maliciously or recklessly, or in callous disregard" of Bowen's rights (Jury findings Nos.4 and 6, A22).

The amount of Bowen's back wage damages was stipulated by all parties before trial and was never contested, and the jury

found that $47,000 represented the compensatory damages due Bowen. (Jury finding No.3, A21-A2). Based on instructions setting forth the law as the District Court believed it to exist, the jury was requested to and did divide these damages between the Postal Service and the Union according to their fault: $30,000 was attributed to the Union, and $17,000 was attributed to the Postal Service (Jury finding No.8, A22). [a] The special jury verdict also awarded Bowen $10,000 in punitive damages against the Union and $30,000 in punitive damages against the Postal Service (Jury findings Nos.5 and 7, A22).

The trial court then issued a judgment order along with findings of fact and conclusions of law. (A12-A20). The trial court found that "if [Bowen's] grievance had been arbitrated as provided in the collective bargaining agreement. . . a result could have beeen anticipated by approximately August, 1977, reinstating [Bowen] in his employment." (Court finding No.9, A15). The court also found that "based on the facts in evidence it is proper for the Court to infer that [Bowen] would have been returned to his job earlier if [the Union] had fulfilled its duties and that [Bowen] could not proceed independently of [the Union] and reasonably relied upon [the Union] to protect his rights." (Court finding No.10, A15). The trial court found that the Postal Service discharged Bowen without just cause in reckless and callous disregard of Bowen's rights and that the Union handled Bowen's meritorious grievance in an arbitrary and perfunctory manner and in reckless and callous disregard of Bowen's rights. (Court findings Nos.4 and 5, A15).

Judgment was entered in Bowen's behalf for $52,954.12 in compensatory damages in accordance with the jury verdict and the trial court's findings and conclusions. (A12.) (The judgment amount included an additional $5,954.12 in stipulated compensation that Bowen had lost between trial and the date of the judg-

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[a]Bowen had been out of work for approximately 34 months at the time of trial. The jury's apportionment of compensatory damages obviously held the Postal Service responsible for Bowen's lost wages from the time of discharge until he would have been reinstated by arbitration and assigned to the Union responsibility only for the additional lost wages Bowen suffered because of the Union's refusal to request arbitration.

ment order). (Court Findings Nos. 7 and 8, A15.) The trial court ruled, however, that sovereign immunity barred recovery of punitive damages against the Postal Service and that since the Union's conduct was less reprehensible than that of the Postal Service, it would be unfair to impose punitive damages only against the Union. The portion of the jury verdict awarding punitive damages against the Union was thus set aside. (Conclusion No. 5, A18.)

As part of its order, the trial court apportioned the compensatory damage award between the Postal Service and the Union according to the jury findings of comparative fault. (Conclusion No. 4, A17-A18.) Additionally, the trial court ordered the Postal Service to reinstate Bowen or to pay him a specific amount of additional damages in lieu of his anticipated earnings. The court also awarded Bowen $20,000 in attorneys' fees, $15,000 to be paid by the Postal Service and $5,000 to be paid by the Union, and awarded Bowen his costs.

(d) The Fourth Circuit's Decisions

On appeal to the United States Court of Appeals for the Fourth Circuit, both the Union and the Postal Service contested the sufficiency of the evidence underlying the judgments against them and challenged the admissibility of certain evidence. The Postal Service also challenged the District Court's order requiring either Bowen's reinstatement or the payment of additional damages and contended that attorneys' fees could not properly be awarded against it. The Union argued that no part of Bowen's lost wages could be assessed against the Union as compensatory damages. No party, however, contested that Bowen would be owed $52,954.12 in lost wages if liability were affirmed. Bowen, who had been awarded judgment for all the compensatory damages to which he believed himself entitled, did not appeal.

On February 23, 1981, a panel of the Fourth Circuit affirmed the District Court judgment in most respects but ruled that no compensatory damages in the form of lost wages could be assessed against the Union. The panel's decision affirmed the basic findings of fault as to both the Union and the Postal Service, and also the findings that each had acted maliciously or recklessly or in callous disregard of Bowen's rights. Thus, while affirming

the district court's judgment in favor of Bowen for the full amount of his lost wages, $52,954.12, the panel overturned the legal foundation for the instructions that required the jury to apportion the agreed-upon damages between the two wrongdoers according to their comparative fault. The panel opinion said:

> As Bowen's compensation was at all times payable only by the [Postal] Service, reimbursement of his lost earnings continued to be the obligation of the Service exclusively. Hence, no portion of the deprivations—$47,000 plus $5,954.12—was chargeable to the Union. *Cf. Vaca* v. *Sipes*, 386 U.S. 171, 195 (1967).

(Slip Op. at 7, A5.) The award of attorneys' fees was also affirmed.

The Postal Service and the Union thereupon petitioned the Fourth Circuit for a rehearing and suggested a rehearing *en banc*. The Postal Service specifically observed that the panel's decision, by exonerating the Union from having to pay back wage compensatory damages, left the Postal Service with responsibility for paying the entire amount of Bowen's lost earnings. These petitions and suggestions were denied by the Fourth Circuit on May 29, 1981. [A25.]

On July 7, 1981, however, the Clerk of the Fourth Circuit transmitted to the parties a "rewritten" page seven of the panel opinion of February 23, 1981, which added a wholly new footnote directly after the citation to *Vaca* v. *Sipes:*

> [6] We make no revision in the judgment of $22,954.12 against the Postal Service. In this connection we note that no appeal was entered by the plaintiff from the judgment against the Service in the amount of $22,954.12.

(A5; Clerk's transmittal letter reproduced at A27-A28.) This "rewritten" opinion summarily rescinded that portion of the judgment of the district court, which had been affirmed on February 23, 1981, awarding Bowen his full, uncontested compensatory damages of $52,954.12. Although the panel opinion concluded by remanding the case to the district court for amendment

of the judgment consistent with the opinion, the new footnote six effectively voided $30,000 of the district court's judgment and reduced Bowen's award to a total of $22,954.12.

Bowen, treating the "rewritten" panel opinion of July 7, 1981, as a new final opinion of the Fourth Circuit, filed a timely petition for rehearing and suggestion for rehearing *en banc*. That petition and suggestion have not yet been ruled upon. [3]

SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision of the Fourth Circuit directly conflicts with principles this Court announced in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), in that it erroneously disallowed the award of compensatory damages composed of lost wages against a union found to have caused the loss of wages by representing its member unfairly. In addition, the decision conflicts with a decision of the Tenth Circuit and with other decisions of the Fourth Circuit on this issue.

This Court has stated that unfair representation actions further a significant goal of national labor policy—the peaceful, swift resolution of labor grievances through contractual means—by encouraging good faith, diligent efforts by a union on behalf of its members. The decision of the Fourth Circuit undermines that goal by holding a union unaccountable for the damages caused to a member by the union's callous and reckless handling of his grievance.

Finally, a belated addendum to the decision of the Fourth Circuit, based on a serious misapprehension of the nature and scope of the issues before that court, illogically and unjustifiably eradicates the majority of the damages awarded to petitioner in the district court. Because the Fourth Circuit's judgment imposes irreparable and unwarranted harm on petitioner, this Court should exercise its supervisory powers to correct a manifest injustice.

REASONS FOR GRANTING THE WRIT

(a) The Decision of the Fourth Circuit that a Union Cannot be Required to Compensate a Member for the Wages He

[3] See footnote 1, *supra*.

Lost Because of the Union's Breach of its Duty of Fair Representation Contradicts Principles Announced by this Court in *Vaca* v. *Sipes* and its Progeny.

The Fourth Circuit affirmed the findings that the Union's fault *caused* a substantial and identifiably portion of Bowen's loss of wages. Specifically, the district court found and the Fourth Circuit affirmed that Bowen's grievance, if arbitrated, would have resulted in Bowen's reinstatement with the Postal Service and that Bowen remained unemployed for more than two years due to the Union's failure to request arbitration on Bowen's behalf—a failure that was malicious or reckless or in callous disregard of Bowen's rights. The district court therefore confirmed the jury's allocation of a portion of the uncontested amount of Bowen's lost wages to the Union in accordance with the Union's fault. Without disturbing the district court's findings of fact, the Fourth Circuit ruled that the Union could not be required to pay compensatory damages that were composed of lost wages.

As this Court recently stated, the touchstone for ascertaining the propriety of damage award is whether the award implements a remedial scheme that effectuates the legislative purposes and national labor policy expressed in the relevant federal labor laws. *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 47-48 (1979). Petitioner submits that the applicable decisions of this Court clearly indicate that requiring a union to respond in compensatory damages comprising an appropriate portion of the injured employee's lost wages, where the union's fault has caused the loss, comports with national labor policy.

In the seminal case of *Vaca* v. *Sipes*, 386, U.S. 171 (1967), this Court ruled that a court hearing a §301 suit may award an aggrieved employee the damages caused by his union's breach of its duty of fair representation where the union has arbitrarily or in bad faith refused to process the employee's grievance. This Court said:

> If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. *Presumably, in at least some cases, the union's breach of duty will have enhanced or contributed to the employee's*

> *injury*. What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the court to pay for the union's wrong—*slight deterrence, indeed, to future union misconduct*—or the injured employee would be forced to go to two tribunals to repair a single injury. . . .Given the strong reasons for not pre-empting duty of fair representation suits in general, and the fact that the courts in many §301 suits must adjudicate whether the union has breached its duty, we conclude that the courts may also fashion remedies for such a breach of duty.

386 U.S. at 187-88 (emphasis added). In discussing the appropriate remedy for breach of a union's duty of fair representation, this Court said:

> In some cases, for example, *at least part of the employee's damages may be attributable to the union's breach of duty*, and an arbitrator may have no power under the bargaining agreement to award such damages against the union. In other cases, the arbitrable issues may be substantially resolved in the course of trying the fair representation controversy. In such situations, the court should be free to decide the contractual claim and to award the employee appropriate damages or equitable relief.
>
> A more difficult question is, what portion of the employee's damages may be charged to the union. . . .
>
> *The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each*. Thus, damages attributable *solely* to the employer's breach of contract should not be charged to the union, *but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer*.

386 U.S. at 196-98 (emphasis added).

Three years later, in *Czosek* v. *O'Mara*, 397 U.S. 25 (1970), this Court, in reviewing a dispute arising under the Railway Labor Act, elaborated slightly upon the nature of compensatory damages for loss of employment that can be assessed against a union that has breached its duty of fair representation. This Court held that such a union could be assessed "those damages that flowed from [its] own conduct," specifically encompassing damages "to the extent that [the Union's] refusal to handle the grievances added to the difficulty and expense of collecting from the employer." 397 U.S. at 29.

In *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), another §301 suit, this Court ruled that discharged employees were entitled to "an appropriate remedy" against both their employer and their union if the employees could prove that their discharges were improper and that their union's breach of its duty of fair representation tainted arbitration decisions that upheld the discharges. 424 U.S. at 572. In his concurring opinion, Justice Stewart discussed the nature of this "appropriate remedy," and his example is directly applicable to the case at bar:

> But this is not to say that proof of breach of the Union's representation duty would render Anchor [the employer] potentially liable for backpay accruing between the time of the "tainted" decision by the arbitration committee and a subsequent "untainted" determination that the discharges were, after all, wrongful.
>
> If an employer relies in good faith on a favorable arbitral decision, then his failure to reinstate discharged employees cannot be anything but rightful, until there is a contrary determination. *Liability for the intervening wage loss must fall not on the employer but on the Union.* Such an apportionment of damages is mandated by Vaca's holding that "damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance

> should not be charged to the employer." 386 U.S. at 197-198. To hold an employer liable for back wages for the period during which he rightfully refuses to rehire discharged employees would be to charge him with a contractual violation on the basis of conduct precisely in accord with the dictates of the collective agreement.

424 U.S. at 572-73 (emphasis added).

The case at bar presents precisely the situation envisioned in Justice Stewart's concurrence in *Hines*, except that here the Union behaved even more reprehensibly by wholly failing to give Bowen the chance to have his discharge arbitrated. Since Bowen's case was never arbitrated, his discharge remained "rightful" as a matter of contractual procedure until judgment was entered for Bowen in this litigation. As the trial court found, the Union's failure to process Bowen's discharge to arbitration was malicious or reckless or in callous disregard of Bowen's rights, and *arbitration*, if sought, *would have resulted in Bowen's reinstatement*. (A15, A17-A18.) Thus, the employer's discharge was indisputably the cause of Bowen's lost wages up until the time that arbitration would have put him back to work. From this point forward, however, Bowen's lost compensation was directly attributable to the Union's malicious or reckless failure to request arbitration. As Justice Stewart explicitly recognized, *Vaca* v. *Sipes* requires that these additional damages caused by the Union's refusal to process the grievance should be charged to the party that caused the loss—the Union.

In *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979), this Court held in a Railway Labor Act case that the award of punitive damages against a union that has actionably breached its duty of fair representation would not further national labor policy. The discharged employees in *Foust* had also been awarded substantial compensatory damages against their union, and this award was not reviewed by this Court. 442 U.S. at 45 n.4. The Court's decision that punitive damages are not available was premised on a belief that the fundamental purpose of fair representation suits is "to compensate for injuries caused by violations of employees' rights." 442 U.S. at 48-49.

Finally, in *Clayton* v. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 49 USLW 4550 (Nos. 80-5049 and 80-54, May 26, 1981), this Court held that an employee need not, as a precondition to filing a §301 action, exhaust internal union appeals procedures that could not reactivate the employee's grievance or grant him the complete relief he seeks under §301. In so holding, this Court reaffirmed that compensatory damages can be assessed against both the employer and the union if each is at fault:

> Reinstatement is available only from the employer, because the union has no power to order reinstatement under the collective-bargaining agreement. *Damages, however, can be assessed against both the employer and the union.* As we stated in *Vaca* v. *Sipes, supra*, 386 U.S. at 197-198, an employee who establishes that the union breached its duty of fair representation in processing his grievance, and that the employer breached the collective-bargaining agreement, may be entitled to an award of damages "*apportion[ed] . . . between the employer and the union according to the damage caused by the fault of each*. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, *but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.*"

49 USLW at 4553, n. 15 *(emphasis added)*. [4]

In all these cases, this Court has consistently held that a union may be required to pay that portion of an employee's damages that it has caused. *Vaca* v. *Sipes* held that "increases if any in [the employee's] damages caused by the union's refusal to process the grievance should not be charged to the employer." 386 U.S. at 197-98. *Czosek* v. *O'Mara* held that damages are

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[4]The parties in *Clayton* stipulated that the union appeals procedure could result in an award of *backpay* from the union to the aggrieved employee in an appropriate case. 49 USLW at 4553. It is thus clear that, at least with respect to the union involved in *Clayton*, no policy prohibited an aggrieved employee from recovering lost wages from the union where the union's breach of its duty of fair representation caused the loss of pay.

recoverable from a union to the extent that the union's refusal to handle a grievance adds to the difficulty and expense of collecting damages from the employer and confirmed that a union is liable for damages that flow from its own conduct. 397 U.S. at 29.

Justice Stewart's concurrence in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. at 572-73, speaks directly to the situation that faced the Fourth Circuit in this case. Bowen sustained damages composed of lost wages and benefits. Some of the loss was due to the fault of his employer, who fired him without just cause. Additional damage was caused by the fault of the union, which breached its duty of fair representation by refusing, maliciously, recklessly, or in callous disregard of Bowen's rights, to request arbitration. The trier of fact that passed on the union's activities in this case found the union was at fault in handling Bowen's case and that the arbitration, if requested, would have resulted in Bowen's reinstatement. The trial court, relying on the jury verdict as to the union, thus apportioned Bowen's lost wages between the two parties at fault, and it correctly assessed the union with those damages caused by and flowing from the union's breach of duty.

The Fourth Circuit, however, held that the Union could not be compelled to pay any compensatory damages to Bowen, at least to the extent such damages compensated for lost wages. That is not the law. This Court has consistently held that where a union's breach of its representational duty to a member has caused him to suffer increased or additional damages, and where, as here, both the fact of the breach and the amount of the increased or additional damages have been competently determined, the union may be required to respond in the amount of such damages. Because the ruling of the Fourth Circuit contradicts principles announced in controlling decisions of this Court, that ruling must be reversed. [8]

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[8] The Court's decision in *Clayton* v. *International Union, United Automobile, Aeorspace and Agricultural Implement Workers of America*, 49 U.S.L.W. 4550 (Nos. 80-5049 and 80-54, May 26, 1981), was handed down immediately before the Fourth Circuit denied the initial petition for rehearing in this case. Since the Fourth Circuit had no opportunity to consider the impact of *Clayton*, petitioner suggests that summary remand to the Fourth Circuit for reconsideration may be appropriate.

(b) The Decision of the Fourth Circuit Conflicts with a Decision of the Tenth Circuit on a Substantially Identical Question and with Other Decisions of the Fourth Circuit Itself

In *Foust* v. *International Brotherhood of Electrical Workers*, 572 F.2d 710 (10th Cir. 1978), the Tenth Circuit affirmed awards of compensatory and punitive damages against a railroad union that breached its duty of fair representation by failing to process a wrongfully discharged employee's grievance in a timely manner. This Court, of course, subsequently reversed the award of punitive damages. 442 U.S. 42 (1979). But this Court specifically observed that its grant of certiorari was limited to the question of punitive damages and did not encompass the propriety of the compensatory award. 442 U.S. at 45 n.4.

It is clear from the decision of the Tenth Circuit in *Foust* that the $40,000 compensatory award against the union comprised approximately $31,000 in wages lost as a result of the union's failure to process the grievance, $1,000 in medical costs resulting from lost insurance, and additional amounts representing the loss of other fringe benefits. 572 F.2d at 718. Thus, the portion of the Tenth Circuit opinion in *Foust* that remains good law clearly affirms an award against a culpable union of compensatory damages composed primarily of wages lost as a result of the union's failure to process a discharged employee's grievance.

The Fourth Circuit itself, moreover, has twice ruled that lost wages are a proper element of compensatory damages that may be awarded against a union that has breached its duty of fair representation. In *Harrison* v. *United Transportation Union*, 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), another panel of the Fourth Circuit held, over a dissent on this precise issue, that lost wages were a proper element of the damages awarded against a railroad union for its misconduct in failing to process the grievance of an employee who suffered a sixty day suspension without pay. 530 F.2d at 562-63. In *Thompson* v. *Brotherhood of Sleeping Car Porters*, 367 F.2d 489, 492 (4th Cir. 1966), *cert. denied*, 386 U.S. 960 (1967) the court affirmed an award of lost wages against a railroad union that had breached its duty of fair representation by refusing, despite protests, to place an employee in his appropriate place on a seniority roster.

Manifestly, the holding of the Tenth Circuit in *Foust* directly conflicts with the holding of the Fourth Circuit in the case at bar. Moreover, the rulings of the Fourth Circuit itself are inconsistent on this point. For the reasons discussed in section III, *infra*, authoritative resolution of this issue is crucial to the effective operation of national labor policy, and this Court should resolve the conflict between the circuits.

(c) The Decision of the Fourth Circuit Seriously Impairs the Efficacy of Unfair Representation Suits and Therefore Frustrates Principles of National Labor Policy Announced by this Court.

In *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. at 48-49, this Court observed that the fundamental purpose of a fair representation suit is to compensate the injured employee for the losses caused by violation of his rights and emphasized that relief in each case should be fashioned to make the injured employee whole. This Court's opinions have held that the fashioning of "an appropriate remedy" against a culpable union should not only compensate the injured employee but deter future union misconduct. All the relevant decisions of this Court have held that a culpable union is liable to its aggrieved member for those damages which the union's fault has caused. As the discussion in section I, *supra*, indicates, that liability includes an obligation to make the member whole for those lost wages which are properly attributable to the union's breach of duty.

The holding of the Fourth Circuit in the case at bar, however, insulates a labor union that has breached its duty of fair representation from the consequences of that breach. Granting that the union was at fault, and that but for the union's breach of duty, the discharged employee would have returned to his job and therefore would have suffered a greatly diminished loss of wages, the Fourth Circuit has held that simply because wages are originally the obligation of the employer, the union cannot be liable for lost wages, even for those wages that were lost because of the union's adjudicated fault. The Fourth Circuit's holding destroys the union's incentive to process grievances adequately—an incentive that, according to *Vaca* v. *Sipes*, is a primary purpose of permitting unfair representation suits against unions in the first

place. Under the Fourth Circuit's ruling, the risk of monetary loss for the union's breach will fall on the employer, which will, contrary to the express command of *Vaca*, be charged with increases in damages caused by the union's refusal to process the grievance. 386 U.S. at 197-98.

The assessment of damages against each party according to its fault furthers the policies underlying a fair representation suit. It is manifest that a substantial percentage of any aggrieved employee's compensatory damages in a case of this type will be composed of lost back wages and fringe benefits which will always have been payable by the employer in the first instance. If, as a matter of law, no portion of these lost wages can be allocated to a union regardless of the union's fault in causing the wages to be lost, the union's stake in a fair representation suit becomes merely academic. The only risk a culpable union runs is having to pay some portion of a successful employee's attorneys' fees (but only in those cases so flagrant as to justify assessment of attorney's fees).

The Fourth Circuit's decision completely undermines the purpose for which an unfair representation suit against a union is designed—to require a culpable union to make the aggrieved employee whole insofar as the union's fault has caused the employee's damages, and thereby to deter the union from future like misconduct. The Fourth Circuit's misapprehension of one of the central policies underlying unfair representation litigation must be corrected by this Court.

(d) This Court Should Exercise its Supervisory Powers to Correct the Fourth Circuit's Unjust and Erroneous Reduction of Petitioner's Stipulated and Uncontested Award of Compensatory Damages.

The district court found, based on the jury's determinations and the stipulation of the parties, that Bowen suffered a total of $52,954.12 in actual damages, representing his lost wages from the date of his discharge. The amount of these damages has never been contested in this litigation. Neither the Union nor the Postal Service asked the Fourth Circuit to order remission of the total award, nor was such a request made in any of the various briefs filed for and against the petition for rehearing.

The February 23, 1981, opinion of the Fourth Circuit reverses the district court on but a single point: whether the damages assessed against the Union can comprise a portion of Bowen's lost wages. That opinion plainly left intact Bowen's judgment for $52,954.12. All parties justifiably assumed that, upon remand, the district court would amend its judgment to reallocate to the Postal Service responsibility for Bowen's full damages in accordance with the law of the case.

Neither the Postal Service nor the Union suggested anywhere in the briefs in the Fourth Circuit that Bowen would be entitled to less than $52,954.12 if the liability findings in the district court were affirmed on appeal. Since the amount of Bowen's award was not challenged on appeal, Bowen himself touched only briefly on the issue:

> Of course, as far as Bowen is concerned, the argument over damage apportionment is purely between APWU [the Union] and USPS [the Postal Service] and, thus, academic. There is no question but that Bowen sustained the compensatory damages awarded. If APWU is not liable for them, then the USPS is.

(*Brief for Appellee* at 50.)

The February 23 panel opinion is perfectly consistent with this perception. The February 23 opinion affirmed Bowen's judgment for $52,954.12 and recited that Bowen was "entitled . . . to reimbursement for his resulting loss of earnings and fringe benefits . . .," which amounted, as the Fourth Circuit recognized, to $52,954.12. (A4-A5.) The effect of the February 23 ruling on the Union's amenability to an assessment of damages was to reapportion liability for Bowen's undisputed damages entirely to the Postal Service—not to reduce the amount of those damages. Indeed, the Postal Service filed a petition for rehearing and suggestion for rehearing *en banc* expressly observing that, as a result of the exoneration of the Union, the Postal Service would now be responsible for paying all of the damages that had been awarded to Bowen. There was no hint from any party that Bowen was anything but a disinterested observer on the question of allocation of his uncontested damages.

When, on July 7, 1981, the Fourth Circuit chose to rewrite and republish its earlier final opinion, it added footnote 6:

> [6] We make no revision in the judgment of $22,954.12 against the Postal Service. In this connection, we note that no appeal was entered by the plaintiff from the judgment against the Service in the amount of $22,954.12.

(A5.) This footnote alters drastically the law of the case and summarily eliminates $30,000 of the undisputed damages that were awarded to Bowen in the district court and affirmed on February 23. The only apparent basis for this action is the reference to Bowen's failure to appeal a "judgment against the [Postal] Service in the amount of $22,954.12." The rewriting panel thus apparently believed that a separate judgment was rendered for Bowen against the Postal Service in this lower amount, which judgment was not before the Court of Appeals because Bowen should have—but did not—note an appeal himself. This perception of the case is manifestly wrong, and is demonstrably inconsistent with a proper understanding of the judgment of the district court and the February 23, 1981, panel opinion.

First, by reducing the total amount of Bowen's award of compensatory damages, the footnote alters a finding and a part of the district court's judgment that no party questioned in the Fourth Circuit and grants relief that no party requested. Bowen's *judgment* was for $52,954.12. The allocation of $22,954.12 of this amount to the Postal Service was purely a function of the district court's understanding of the law governing union responsibility for damages in §301 cases, an understanding that the Fourth Circuit reversed.

Moreover, the footnote imposes an anomalous, *ex post facto* burden on Bowen by apparently requiring that he should have appealed from a judgment that granted him all the relief he sought. Bowen won in the district court both on the issue of liability as to the Union and the Postal Service and on the issue of damages. He was awarded all the compensatory damages to which he believed himself entitled. No rational principle of justice or judicial economy would require a successful plaintiff, who has proved the defendants' fault and the amount of his damages,

to file a purely protective cross-appeal for the sole purpose of contesting the apportionment adopted by the trial court.

The closest analogy to this proceeding is a tort action in a jurisdiction that has adopted comparative fault. In such jurisdictions, liability of joint tortfeasors to the injured party is joint and several, but the trier of fact allocates fault among the tortfeasors. This allocation controls contribution among all those liable to the injured party for damages. If a plaintiff has been awarded his full damages, he does not appeal the apportionment of fault. If judgment is reversed as to any tortfeasor on appeal, the law requires that the case be remanded for apportionment of the damages owed among the remaining parties whose fault has caused the loss.

The liability of an employer and a union in a §301 action is not, of course, generally joint and several. *Vaca* v. *Sipes*, 386 U.S. at 197 n.18. But the general principle concerning the effect of reversal of the apportionment of damages on appeal should apply here as well. While the law governing apportionment of these damages is in some disarray and needs guidance from this Court, the apportionment question in a §301 action is properly the concern of the parties held liable by the district court. The heart of the matter is that Bowen was awarded his full damages; which party paid them, and in what proportion, were not Bowen's concern, and he could add nothing to the discussion on appeal that the parties truly affected could not argue vigorously for themselves. The Fourth Circuit's requirement that a successful plaintiff appeal from a verdict in his favor is not only illogical on its face; it works manifest injustice in Bowen's case, and in future similar cases it will accomplish only a superfluous complication of the posture of the case on appeal and produce a multiplicity of briefs and papers that serve no useful function in aid of the appellate process.

If the Fourth Circuit panel meant to suggest in footnote 6 that Bowen failed to protect against the possibility that the total amount of his compenstory award was in jeopardy on the appeal, such a suggestion simply is not accurate. Bowen responded to all substantive challenges to the validity of his award. Since neither the Union nor the Postal Service sought to set aside or reduce the total amount of the award, Bowen had no obligation to "protect" it. Indeed, Bowen made clear in his brief his understanding that

any lingering questions affected only the apportionment of the fixed amount of his damages, not the determination of that amount itself.

The result of this case, after footnote 6, is:

1. Bowen is entitled to $52,954.12 for lost wages and fringe benefits, according to the judgment of the district court as affirmed by the Fourth Circuit.

2. Some of that loss occurred as a result of the fault of the Postal Service.

3. Some of that loss occurred as a result of the Union's breach of its duty to Bowen.

4. Because Bowen's damages ($52.954.12) are for lost wages and fringe benefits, and because "Bowen's compensation was at all times payable only by the [Postal] Service," (A5), *only* the Postal Service can be compelled to compensate Bowen for his lost wages.

5. Because the Union's breach of duty caused Bowen to lose $30,000 in wages and fringe benefits, and because the Postal Service is not liable for damages that the Union caused, the Postal Service owes Bowen only $22,954.12 of the $52,954.12 in damages he suffered.

This Court should not permit such an unjust and incoherent result to stand. *Vaca* v. *Sipes* empowered federal courts to do complete justice in a single action. In addition to deciding that both employers and unions must pay the compensatory damages that flow from their fault, *Vaca* stands for the proposition that the injured employee can and should be made whole in one action against both his employer and his union. The Fourth Circuit's opinion, as rewritten on July 7, does violence to both principles.

If this Court declines to grant this petition for a writ of certiorari on the issue of the Union's liability for part of the award of compensatory damages, petitioner respectfully urges that this Court should exercise its supervisory powers to correct the clear

injustice caused by the Fourth Circuit's irregular and erroneous proceeding in this case. Petitioner specifically urges that this Court summarily grant this peititon for certiorari without requiring further briefing and reverse and remand the decision of the Fourth Circuit for modification so that petitioner is awarded the full amount of his adjudicated damages.

CONCLUSION

The Fourth Circuit has held in this case that a union cannot be required to pay compensatory damages composed of lost wages, even though those wages were lost because of the union's culpable failure to process its member's grievance to arbitration and even though such arbitration would have resulted in the member's reinstatement. Because the Fourth Circuit's decision destroys the efficacy of a suit alleging unfair representation, this Court should grant this petition for a writ of certiorari and resolve this important issue of national labor policy. Petitioner respectfully suggests that, since the Fourth Circuit did not have the benefit of this Court's decision in *Clayton* v. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 49 USLW 4550 (Nos. 80-5049 and 80-54, May 26, 1981) when it decided this case, summary remand to the Fourth Circuit for reconsideration in light of *Clayton* may be appropriate.

In the alternative, this Court, in the interests of fairness and justice, should exercise its supervisory powers and summarily remand this case to the Fourth Circuit for modification of its opinion as rewritten July 7, 1981, so as to award petitioner the full amount of the damages to which all parties and all courts have agreed he is entitled.

Respectfully submitted,

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August, 1981

Appendix

APPENDIX A

[This is a copy of the text of the opinion as reissued on July 7, 1981. Save for the addition of footnote 6, it is identical to the text issued on February 23, 1981.]

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 79-1455

CHARLES V. BOWEN, Appellee,
v.
UNITED STATES POSTAL SERVICE, Defendant,
and
AMERICAN POSTAL WORKERS UNION; AFL-CIO,
Appellant.

79-1464

CHARLES V. BOWEN, Appellee,
v.
UNITED STATES POSTAL SERVICE, Appellant,
and
AMERICAN POSTAL WORKERS UNION; AFL-CIO,
Defendants.

Appeals from the United States District Court for the Western District of Virginia, At Roanoke. James C. Turk, Chief Judge.

(Argued: October 9, 1980 Decided: February 23, 1981)

Before BRYAN, Senior Circuit Judge,
HALL and MURNAGHAN, Circuit Judges.

Patrick J. Riley (Daniel B. Jordan, Cafferky, Powers, Jordan & Lewis on brief) for Appellant American Postal Workers Union, AFL-CIO; Bruce Joel Jacobsohn, Senior Assistant Regional Labor Counsel, United States Postal Service (Thomas R. King, Jr., Assistant United States Attorney; Stephen E. Alpern, Associate General Counsel, United States Postal Service on brief) for

Appellants; William B. Poff (Bayard E. Harris, Betty Jo Anthony, Woods, Rogers, Muse, Walker and Thornton on brief) for Appellee.

Albert V. Bryan, Senior Circuit Judge:

Plaintiff-appellee, Charles V. Bowen, on February 21, 1976 was indefinitely suspended, without pay, from employment with appellant United States Postal Service (Service or appellant)[1] in Lynchburg, Virginia, for an alleged assault upon a co-employee during an altercation with him. At that time Bowen was a member of the American Postal Workers Union, AFL-CIO, (Union or appellant). It was the recognized collective bargaining agent of the Service employees under a written national contract and the unit with which Bowen filed a grievance challenging his suspension. Refused reinstatement, Bowen brought this action, December 14, 1976, in the United States District Court for the Western District of Virginia for damages against the Service[2] and

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[1]39 U.S.C. § 201: "There is established, as an independent establishment of the executive branch of the Government of the United States, the United States Postal Service."

[2]39 U.S.C. § 409:

* * * *

(b) Unless otherwise provided in this title, the provisions of title 28 relating to service of process, venue, and limitations of time for bringing action in suits in which the United States, its officers, or employees are parties, and the rules of procedure adopted under title 28 for suits in which the United States, its officers, or employees are parties, shall apply in like manner to suits in which the Postal Service, its officers, or employees are parties.

(c) The provisions of chapter 171 (28 U.S.C. §§2671-2680) and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service.

* * * *

28 U.S.C. §2674: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

the Union.[3] The complaint charged the former with wrongful suspension and the latter with breach of its duty to fairly represent

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28 U.S.C. §1346:

* * * *

(b) Subject to the provisions of chapter 171 (28 U.S.C. §§ 2671-2680) of this title, the district courts, . . .shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * *

[3]29 U.S.C. § 159:

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect; *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * *

29 U.S.C. § 185:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * *

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

* * * *

Bowen's collective bargaining interests through conference, arbitration or otherwise.

The District Court submitted to a special trial jury interrogatories which in substance embodied the complaint and the traversing defenses of the Union. The question of the right or wrong of Bowen's suspension by the Service was also posed in these interrogatories to the same jury, but then sitting as an advisory panel.[4] The responses of the trial jury, resting on a preponderance of the evidence as instructed by the Court, upheld all of Bowen's claims against both defendants. The findings and conclusions of the trial judge on the advisory verdict avouched the rightfulness of Bowen's claims against the Service.

Approving these verdicts, findings and conclusions, the District Court entered judgment as follows:

(1) That the suspension of Bowen by the Service was in actuality a discharge;

(2) That the Service discharged Bowen without cause, in abrogation of the collective bargaining agreement, and that the conduct of both the Union and the Service was in "reckless and callous disregard" of Bowen's rights;

(3) That Bowen is entitled to reinstatement to his former employment with the Service and to reimbursement for his resulting loss of earnings and fringe benefits from February 21, 1976 (date of discharge) to December 20, 1978 (date of trial) in the amount of $47,000.00, as fixed by the jury, plus the sum of $5,954.12 added by the trial judge for similar losses between December 20, 1978 and April 11, 1979 (hearing on post trial motions);

(4) That if Bowen's grievance had been arbitrated by the Union as provided in the collective agreement he could have been reinstated by approximately August 1977 but, because of his discharge and despite his repeated efforts, he has been unable to obtain other employment since February 21, 1976;

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[4] 28 U.S.C. § 2402: "Any action against the United States under section 1346, *supra* note 2, shall be tried by the court without a jury, . . ."

(5) That Bowen's wage-loss of $47,000.00 should be indemnified by the Union to the amount of $17,000.00 *(sic)* and by the Service in the sum of $30,000.00 *(sic)* and the Service alone should reimburse him for the further loss of $5,954.12;*

(6) That Bowen recover punitive damages from the Service and the Union; [5] and

(7) That counsel fees and court costs be awarded Bowen against the Service and the Union.

ERRORS ASSIGNED ON APPEAL

Errors in the judgment's monetary adjudications are pressed by the appellants. However, upon study of each of them we hold them insufficient in law or fact to warrant modification of the judgment, save in the following instance:

I. As Bowen's compensation was at all times payable only by the Service, reimbursement of his lost earnings continued to be the obligation of the Service exclusively. Hence, no portion of the deprivations—$47,000.00 plus $5,954.12—was chargeable to the Union. *Cf. Vaca v. Sipes*, 386 U.S. 171, 195 (1967). [6]** As well, too, the Service must comply with the final mandate of the District Court:

> (3) Defendant USPS is directed to reinstate plaintiff within sixty (60) days from entry hereof to his same and previous or a similar position, within the Virginia District, Eastern Region, at a location

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[5]Punitive damages are not assessable against the Service as an agency of the United States. *See* 28 U.S.C. §2674, *supra* note 2. They were denied as against the Union as unfair in view of the Service's immunity and are not an issue in this appeal.

[6]We make no revision in the judgment of $22,954.12 against the Postal Service. In this connection we note that no appeal was entered by the plaintiff from the judgment against Service in the amount of $22,954.12.

*[The Fourth Circuit's opinion here inadvertantly switches the actual apportionment of damages.]

**[This footnote appears only in the July 7, 1981 version of the opinion.]

and facility to be determined by the defendant USPS subject to the approval of this Court, such reinstatement to include full seniority from the date of plaintiff's suspension, February 21, 1976. If reinstatement is approved for any facility other than the Lynchburg, Virginia facility, the plaintiff's seniority date for contractual benefits shall be the same as that held at the Lynchburg facility.

(4) If defendant USPS continues to deem reinstatement impractical, as an alternative to reinstatement, plaintiff is to be awarded his future loss of earnings to be paid by the defendant USPS in the amount of $125,000 with interest at the legal rate from April 11, 1979.

II. Error is ascribed to the reception at trial of the testimony of Gladys Wilkes Johnson, called to the stand by Bowen, as an expert on labor relations and arbitration, to give evidence upon the factors essential and requisite to constitute fair representation by a union. We see nothing amiss in the allowance of this proof and, furthermore, even if error, it would be but harmless, not justifying a reversal of the District Court. Fed.R.Civ.P. 61.

At all events the testimony was admissible for its relevance. The fundamental accusation by Bowen was that the Union "had breached its duty of fair representation." Johnson, speaking to the instantly proven facts, testified that the Union's conduct evinced a prejudicial indifference and irreverence to this obligation. In her opinion, the Union should have sent Bowen's claim to arbitration, if he was to be assured of a fair hearing on the validity of his termination by the Service.

Next, she qualified as one well informed upon the factual considerations integral in a union's duties. Before permitting Johnson as an expert to give an opinion on what constitutes fair representation by a union, the District Judge permitted close and in-depth questioning into her background and knowledge of the subject. This exploration revealed that she had participated in the preparation and presentation of arbitrations for almost 20 years. In this period she had been active as a member and president of a local union of 430 members. In an attempt to impeach this quali-

fication, opposing counsel observed in cross-examination that the Union in this case had a membership of several thousand and so was not comparably within her experience. Overruling the objection the presiding judge commented:

> But the duty is the same regardless of the union, and that is to give fair representation to the members of the union in these procedures. And it applies to the Postal Union, and it applies to the Union that this lady represents. She's been in this business, she says, for twenty-some years. Now, I'm going to qualify her as an expert and I'm going to permit her to testify as to her opinion as to whether or not this case—I guess she's examined the file, have you not?

Furthermore, in his charge to the jury he ensured the appellants full protection against intrusion upon the privilege of a defendant not to be subjected to the surmise of a witness. The instruction rigidly narrowed the evaluation to be given the Johnson evidence by the jury:

> I would tell you that normally the rules of the evidence do not permit a witness to testify as to their opinions or conclusions. An exception to this rule exists, however, as to those whom we refer to as expert witnesses. Witnesses who by education and experience have become expert in some art, science, profession or calling, may state their opinion as to relevant and material facts in which they profess to be expert. And they may also give to you the reasons for their opinions. You should consider any expert witness received in evidence in this case, and give it such weight as you may think it deserves.
>
> If you should decide that an opinion of a so called expert witness is not based upon sufficient education or experience, or if you should conclude that the reasons given in support of the opinion are not sound, you may reject the opinion entirely.
>
> After making your own judgment, you will give the testimony of each witness just such credibility as you may think it deserves.

The admissibility *vel non* of the testimony was to be resolved by the District Judge; it was "within the broad discretion of the trial judge and his action is to be sustained unless manifestly erroneous." *Boleski v. American Export Lines, Inc.*, 385 F.2d 69,71 (4th Cir. 1967).

Rule 702, Federal Rules of Evidence confirms the propriety of such testimony in trial:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

For the reasons herein recited, the judgment of the District Court will be affirmed throughout, except in regard to the error discussed in section I, *infra*, with respect to which the action will be remanded for amendment of the judgment consistently with this opinion.

Affirmed in Part;
Reversed in Part; and
Remanded.

MURNAGHAN, Circuit Judge, dissenting:

A district judge retains wide latitude in deciding whether and over what subjects a particular witness qualifies as an "expert" under Rule 702 of the Federal Rules of Evidence. *See Boleski v. American Export Lines, Inc.*, 385 F.2d 69, 71-72 (4th Cir. 1967):

> An expert has been defined as one who has acquired special knowledge of the subject matter about which he is to testify, either by study of the recognized authorities or by practical experience and who can assist and guide the jury in solving a problem which the jury is not able to solve because its knowledge is inadequate. 20 Am.Jur. § 783, p. 656.

> In Cranston Print Works Co. v. Public Service Co. of North Carolina, 4 Cir., 291 F.2d 638, 645 (1961), we approved the statement made in Padgett v. Buxton-Smith Mercantile Co., 262 F.2d 39 (10 Cir. 1958), that "expert testimony is admissible if it reasonably tends to aid the trier in the resolution of the decisive issue, and is not a mere guess or conjecture." 262 F.2d at 41.

However, manifestly there are limits to such discretion. In the instant case, I conclude that the district judge exceeded his authority in qualifying the plaintiffs' witness as an expert on labor relations of the type involved in the case. Because the defendants were unfairly prejudiced by her "expert" testimony, I would reverse and remand for a new trial.

The crux of the case was the adequacy or inadequacy of representation of the plaintiff by the defendant national Union. Testimony established that, following his dismissal, Bowen filed a grievance with his local, whose president recommended to the regional office that the Union press the grievance. In turn, the regional office recommended to the national office that the grievance be certified for arbitration. The national office, after a 15-30 minute review of the 67-page and cassette tape case file, refused to certify the case for arbitration. A factor allegedly taken into account was the national Union's awareness, from the outcome in prior cases, of the extremely remote likelihood success.

At trial, Bowen contended that the above events demonstrated that the Union failed to fulfill its duty to represent him fairly. To support his arguments, he produced Gladys Johnson, claiming for her the status of an expert witness. Over objection, she gave her opinion that the Union's treatment of Bowen's grievance was improper as well as expressing her belief that an arbitrator would untimately have decided the grievance in Bowen's favor, had the Union pressed it.

Ms. Johnson's qualifications to testify as an expert in the areas to which the opinions she expressed pertained were as follows: (1) she served a local union not connected with the American Postal Workers Union as President for six years and Secretary for six years; (2) during the twelve year period, she served on the

local grievance committee charged with processing and sometimes arbitrating local employee grievances; (3) she had on occasion assisted in the preparation of arbitration cases on the local level; and (4) she had attended her union's labor relations school. As the list indicates, Ms. Johnson's experience was gained entirely at the local level. She had had no exposure to methods employed and considerations weighed when, under the applicable grievance procedures, following exhaustion at the local level, the matter was referred first to the regional, and ultimately to the national level.

In determining whether a witness is qualified as an expert, "[t]he test is whether the [expert witness'] education and experience demonstrate a knowledge of the subject matter." *Hill v. Gonzalez*, 454 F.2d 1201, 1203 (8th Cir. 1972). Rule 702 of the Federal Rules of Evidence requires that an expert be qualified "by knowledge, skill, experience, training, or education." *See* 11 Moore's Federal Practice § 702.10[2] (1976). Under that test, Ms. Johnson did not qualify as an expert for the purposes that she was called to testify about. If she had been called to testify regarding a *local* union's duty to its members to represent them fairly, she would almost certainly have qualified as an expert. However, Ms. Johnson was not called upon to express her opinion on the sufficiency of a local grievance practice. Rather, she was asked her views on the sufficiency of a national union's grievance procedures and treatment of Bowen, matters to which she had no demonstrated exposure, no knowledge, no skill, no experience, no training and no education.

Ms. Johnson's experience concerning grievances was two steps removed from the actual decision-making process utilized by the APWU. Her exposure at the local level to employee complaints involved making recommendations to the next level in the union hierarchy. She had never participated in the actual decision even by her own union whether to prosecute a grievance. Finally, she had never presented a case before an arbitrator.

Without some familiarity with the financial and policy constraints on prosecuting grievances, or some contact with the union decision-making level on grievances, or at least some experience in presenting grievances before arbitrators, Ms. Johnson was simply unqualified to give her opinion as an *expert* on the adequacy

of the APWU's grievance practices, on its treatment of Bowen's complaint, or on how an arbitrator might decide the case. As put by the defendants, Ms. Johnson's "sole experience was at a different, lower and less complicated, level of responsibility within a union hierarchy, thus not equipping her for the required analysis." Therefore, the trial court's decision to permit Ms. Johnson to testify as an expert on the matters as to which her opinions were elicited was "manifestly erroneous." *See Boleski, supra*, at 71.

Nor can it properly be argued that allowing Ms. Johnson to testify was but harmless error. Even if we accept that, with her testimony eliminated, the other evidence nevertheless sufficed to support they jury verdict, still, by presenting her as an expert in the labor relations field the district court conferred an apparent, but unjustified dignity and force to testimony by her that never should have been admitted at all. She simply was not qualified to opine that the national Union inadequately considered the request for further pursuit of the grievance. The inherent possibility of prejudice as a result of the jury's giving credence to her testimony is apparent.

Therefore, in my judgment, we should reverse so that the case might be fairly retried.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CHARLES V. BOWEN, Plaintiff	)	
	)	JUDGMENT ORDER
vs.	)	
UNITED STATES POSTAL SERVICE and AMERICAN POSTAL WORKERS UNION, AFL-CIO, Defendants	)	Civil Action Number 76-0255 (R)

Filed May 11, 1979

In accordance with the jury verdict upon special interrogatories and the separate Findings of Fact and Conclusions of Law entered herein the Court ORDERS that:

1) Plaintiff is awarded compensatory damages in the amount of $52,954.12 together with interest at the legal rate from April 11, 1979, and the jury verdict to that extent is affirmed, defendant USPS to pay $22,954.12; defendant APWU to pay $30,000.

2) Defendants' motions concerning punitive damages are granted and judgment entered in their favor as to that aspect of the jury verdict.

3) Defendant USPS is directed to reinstate plaintiff within sixty (60) days from entry hereof to his same and previous or a similar position, within the Virginia District, Eastern Region, at a location and facility to be determined by the defendant USPS subject to the approval of this Court, such reinstatement to include full seniority from the date of plaintiff's suspension, Feb-

ruary 21, 1976. If reinstatement is approved for any facility other than the Lynchburg, Virginia facility, the plaintiff's seniority date for contractual benefits shall be the same as that held at the Lynchburg facility.

4) If defendant USPS continues to deem reinstatement impractical, as an alternative to reinstatement, plaintiff is to be awarded his future loss of earnings to be paid by the defendant USPS in the amount of $125,000 with interest at the legal rate from April 11, 1979.

5) Plaintiff is further awarded his costs in the amount of $1,463.00 against the defendants jointly and severally.

6) Plaintiff is further awarded an attorney's fee in the amount of $20,000, $15,000 to paid by USPS and $5,000 to be paid by APWU.

7) The pleadings are conformed to the evidence at the time of trial.

8) APWU having requested a stay of execution as to the monetary judgments entered against it, it is ordered that execution be stayed upon APWU posting a supersedeas bond of not less than $40,000.00.

9) The Clerk is directed to provide a certified copy herein to all counsel of record.

ENTER:

/s/ James C. Turk
Chief U. S. District Judge

May 10th, 1979

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CHARLES V. BOWEN, Plaintiff	)	Civil Action Number 76-0255 (R)
vs.	)	FINDINGS OF FACT
	)	and
	)	CONCLUSIONS OF LAW
UNITED STATES POSTAL SERVICE	)	
and	)	By: James C. Turk
AMERICAN POSTAL WORKERS UNION, AFL-CIO,	)	Chief District Judge
Defendants	)	

Filed May 11, 1979

Came the parties on April 11, 1979, upon their several post-trial motions and upon the jury verdict returned on December 21, 1978, and the Court, having considered the motions of the parties, the memoranda filed, and the arguments of counsel, and having considered the evidence and the documentary exhibits, the Court makes the following findings of fact not inconsistent with the jury verdict and conclusions of law:

FINDINGS OF FACT

1) Plaintiff Charles V. Bowen was employed by the defendant United States Postal Service (hereafter USPS) and was represented for the purpose of collective bargaining by the defendant American Postal Workers Union, AFL-CIO (hereafter APWU), at all times material to this action.

2) Plaintiff was indefinitely suspended from his employment on or about February 21, 1976, which action amounted to the discharge of plaintiff from his employment.

3) Defendant USPS was a party to a collective bargaining agreement with the co-defendant APWU, which agreement required that the plaintiff could be discharged only for just cause.

4) Defendant USPS discharged plaintiff without just cause in reckless and callous disregard of plaintiff's rights.

5) Defendant APWU handled plaintiff's apparently meritorious grievance arising from his discharge in an arbitrary and perfunctory manner and in so doing acted in reckless and callous disregard of plaintiff's rights.

6) Plaintiff has, since February 21, 1976, actively sought employment from other employers, has repeatedly been rejected for such other employment and has no expectation or opportunity to be employed in the future in substantially equivalent employment.

7) During the period from February 21, 1976, until December 20, 1978, the plaintiff Charles V. Bowen lost wages and fringe benefits in the amount of $47,000.00.

8) During the period December 20, 1978, to April 11, 1979, the plaintiff Charles V. Bowen lost additional wages and fringe benefits in the amount of $5,954.12.

9) If plaintiff's grievance had been arbitrated as provided for in the collective bargaining agreement of the parties a result could have been anticipated by approximately August, 1977, reinstating plaintiff in his employment.

10) Based on the facts in evidence it is proper for the Court to infer that plaintiff would have been returned to his job earlier if the APWU had fulfilled its duties and that plaintiff could not proceed independently of APWU and reasonably relied upon APWU to protect his rights.

11) More than three (3) years have now elapsed since plaintiff's discharge and officials and counsel for the co-defendant USPS have described to the Court the impracticality of reinstating plaintiff to his employment.

12) Plaintiff is presently forty-five years old and could have reasonably expected to be employed by the Postal Service for an additional twenty-five years but for the actions of the

co-defendants as described above. The Court finds that the present value of plaintiff's anticipated earnings projected for the next twenty-five years to be $125,000.00.

13) Plaintiff's counsel have submitted their time records to the court and the parties for review. The court finds the following hours of legal service to have been rendered in the preparation and presentation of this case:

William B. Poff	79.5 hours
Haney H. Bell	151.9 hours
Bayard E. Harris	130.0 hours

14) The Court believes this case to have been one of moderate difficulty because of the involvement of the United States Postal Service and the difficult apportionment issues raised by the litigation. A similar degree of skill was required to develop this case adequately and was provided by the above-named attorneys, each of whom is an experienced attorney of good repute. While the reputations of these attorneys often allows them to command greater hourly rates, the Court finds their opportunity costs in pressing the litigation to be $18,070.00 based upon a rate of $50 per hour. The customary fee for such work, however, would be a contingency ranging from 25% to 33% of the recovery of the jury. Applying a contingency of 25% against the jury verdict of $87,000.00, the Court finds the customary fee to be $21,750.00 Although this case would not have been considered particularly undesirable within the legal community, the expectation of recovery by plaintiff at the outset of the litigation could have been deemed only fair. While the amount in controversy became substantial as the litigation wore on, the results obtained by counsel for their client were considerable.

15) Awards of attorneys fees in similar litigation have been widely varied. In the analogous area of actions brought pursuant to the Landrum-Griffith Act, attorneys fees have ranged from $2,000.00 to $129,000.00. *Richardson v. Mail Handlers*, _____ F.Supp. _____, 99 LLRM 3393 (E.D. Va. 1978). Once it is recognized that the benefits gained from litigation of this motion accrue to similarly situated non-parties as well, *see Harrison v. United Transportation Union*, 530 F.2d 558 (4th Cir. 1975), an award of attorneys fees must be assessed in part in terms of the social value produced by the litigation. In many respects, Mr.

Bowen was a victim of unique circumstances, a factor which tends to reduce the impact of this action on those similarly situated. After a careful and deliberate examination of all these matters, the court finds a fair and reasonable award of attorneys fees to be $20,000.00, $15,000.00 to be paid by the Postal Service, the remainder to be borne by the Union.

CONCLUSIONS OF LAW

1) Jurisdiction over the defendants USPS and APWU is proper pursuant to 28 U.S.C. §1337, 29 U.S.C. §§159 and 185 and 39 U.S.C. §409.

2) The defendant USPS by its unjust discharge of plaintiff, violated the collective bargaining agreement between the co-defendants and thus, breached duties owed plaintiff. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 47 L.Ed.2d 231, 96 S.Ct. 1048 (1976); *Vaca v. Sipes*, 386 U.S. 171, 17 L.Ed.2d 842, 87 S.Ct. 903.

3) The defendant APWU, by its arbitrary and perfunctory handling of plaintiff's apparently meritorious grievance, violated its duty of fair representation to plaintiff. *Hines v. Anchor Motor Freight, Inc., supra; Vaca v. Sipes, supra; Foust v. International Brotherhood of Electrical Workers*, 572 F.2d 710 (10th Cir. 1978); *Hardee v. N.C. Allstate Services, Inc.*, 537 F.2d 1255 (4th Cir. 1976); *Holodnak v. AVCO Corp.*, 514 F.2d 285 (2d Cir. 1975); *Harrison v. United Transportation Union*, 530 F.2d 558 (4th Cir. 1975); *Griffin v. UAW*, 469 F.2d 181 (4th Cir. 1972).

4) Plaintiff is entitled to recover compensatory damages for his lost earnings from the two defendants apportioned between them according to the damage caused by the fault of each. *Vaca v. Sipes, supra*. Although there is authority suggesting that only the employer is liable for damages in the form of back pay, the Court finds that this is a case in which both defendants, by their illegal acts, are liable to plaintiff. *Hines v. Anchor Motor Freight, Inc., supra;* but see, *Czosek v. O'Mara*, 397 U.S. 25, 25 L.Ed.2d 21, 90 S.Ct. 770 (1970) (damages for loss of employment recoverable only from employer *except* to the extent union added to the difficulty and expense of collecting). The problem in this case is not one of liability but rather one of apportionment, which war

properly left to the jury as to the defendant APWU and which, on the basis of the advisory jury, the Court finds was also equitably apportioned as to the defendant USPS. While the USPS set this case in motion with its discharge, the APWU's acts, upon which plaintiff reasonably relied, delayed the reinstatement of plaintiff and it is a proper apportionment to assign fault to the APWU for approximately two-thirds of the period the plaintiff was unemployed up to the time of trial. Accordingly, the Court approves the jury verdict and finds that the defendant USPS is liable to the plaintiff in the amount of $17,000.00 in compensatory damages and that defendant APWU is liable to plaintiff in the amount of $30,000.00 in compensatory damages. Additionally, defendant USPS, which has to date refused to reinstate the plaintiff to employment, is liable in compensatory damages to the plaintiff in the additional amount of $5,954.12 representing lost back wages and fringe benefits incurred from the time of trial to April 11, 1979.

5) Plaintiff is, under the normal principles applicable to this type of case, entitled to recover punitive damages against the defendant USPS. That defendant has, however, raised a plea of sovereign immunity to this aspect of the case, and the Court finds sovereign immunity is a bar to recovery of punitive damages against the USPS. The Court, accordingly, sets aside the jury verdict to the extent that it awarded punitive damages to the plaintiff against the United States Postal Service. Additionally, the Court finds that the actions of the defendant APWU, while supporting the jury verdict and findings of compensatory damages, were less reprehensible than the actions of the USPS. Therefore, as punitive damages cannot be assesed against the USPS, the Court does not deem it fair to impose punitive damages against the APWU. Accordingly, the jury verdict, to the extent that it awards plaintiff punitive damages against the defendant APWU, is set aside.

6) Plaintiff further seeks either reinstatement or some other form of prospective relief. Subject to his duty to mitigate, prospective relief in a case of this sort is appropriate, *DeArroyo v. Sindato De Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir. 1970); *Thompson v. Brotherhood of Sleeping Car Porters*, 367 F.2d 489, 494 (4th Cir. 1966), cert. den., 386 U.S. 960, 18

L.Ed.2d 110, 87 S.Ct. 1019 (1967), so long as it is apportioned between the APWU and USPS along the guidelines of *Vaca v. Sipes, supra*.

7) In view of the factual findings in this case regarding the efforts of plaintiff and the dismal outlook for his reemployment, coupled with the impracticability of his reinstatement, the Court finds that plaintiff's injury has continued since the date of judgment and that prospective relief in the form of future lost earnings is appropriate. *DeArroyo v. Sindato, supra,* see *Richardson v. Communications Workers of America,* 443 F.2d 974 (8th Cir. 1971). (Future loss may extend beyond the term of the collective bargaining agreement.) Defendant United States Postal Service is directed to reinstate plaintiff within sixty (60) days from entry herein to his same and previous, or a similar and comparable position, within the Virginia District, Eastern Region, at a location and facility to be determined by the defendant USPS subject to the approval of the Court, such reinstatement to include full seniority from the date of plaintiff's suspension, February 21, 1976. If reinstatement is approved for any facility other than the Lynchburg, Virginia, facility, the plaintiff's seniority date for contractual benefits shall be the same date as that held at the Lynchburg facility. Alternatively, the defendant USPS, if it continues to deem reinstatement impractical and declines to reinstate him, shall be liable to plaintiff for future loss of earnings in the amount of $125,000.00 with interest thereon at the legal rate from this date until paid.

8) Plaintiff has additionally moved the Court for his costs, including reasonable attorney's fees. The Court finds an award of attorney's fees to be proper under the circumstances of this case. As noted above, the Court is in complete agreement with the jury finding of bad faith and, on that basis, is able to assess such an award against both the USPS and APWU. *See Alyeska Pipeline Service Co. v. Wilderness Society, et al.*, 421 U.S. 240 (1975). Plaintiff's suit also served to vindicate the right of the members of the union to be fairly represented by the union in their claims against their employer. Thus, attorney's fees may be awarded against the defendant union under the common benefit rationale. *Hall v. Cole,* 412 U.S. 1 (1973); *Harrison v. United Transportation Union, supra* at 564.

9) The Court further taxes the bill of costs submitted by plaintiff in the amount of $1,463 to be borne jointly and severally in equal amounts by both defendants.

ENTER:

/s/ James C. Turk
Chief U. S. District Judge
May 10th, 1979

APPENDIX D

Judgment on Jury Verdict

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA,
ROANOKE DIVISION

Charles V. Bowen	)	
vs.	)	
UNITED STATES	)	Civil Action File No.
POSTAL SERVICE,	)	76-0255-R
and	)	JUDGMENT
AMERICAN POSTAL	)	
WORKERS UNION, AFL-CIO	)	

Filed December 21, 1978

This action came on for trial before the Court and a jury, Honorable James C. Turk, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

SPECIAL VERDICT

1. Do you find from a preponderance of the evidence in this case that the defendant American Postal Workers Union as bargaining agent for Lynchburg postal employees breached its duty of fair representation to plaintiff Bowen in the handling of his grievance?

Yes
Answer Yes or No

2. If your answer to Question 1 is yes, do you find from a preponderance of the evidence that plaintiff Bowen was discharged by defendant United States Postal Service without just cause?

Yes
Answer Yes or No

3. If your answer to Question 1 and/or 2 is yes, state from a preponderance of the evidence or with reasonable certainty the

amount of compensatory damages to which plaintiff is entitled.

$47,000.00

4. If your answer to Question 1 is yes, do you find from a preponderance of the evidence that defendant American Postal Workers Union acted maliciously or recklessly, or in callous disregard of the rights of plaintiff Charles V. Bowen in not taking Mr. Bowen's grievance to arbitration?

Yes

Answer Yes or No

5. If your answer to Question 4 is yes, what amount, if any, do you assess in favor of plaintiff Bowen against the defendant American Postal Workers Union as punitive damages?

$10,000.00

6. If your answer to Question 2 is yes, do you find from a preponderance of the evidence that defendant U. S. Postal Service acted maliciously or recklessly, or in callous disregard of the rights of plaintiff Charles V. Bowen in terminating his employment?

Yes

Answer Yes or No

7. If your answer to Question 6 is yes, what amount, if any, do you assess in favor of plaintiff Bowen against the defendant, U. S. Postal Service as punitive damages?

$30,000.00

8. If compensatory damages are awarded by your answer to Question 3, state the amount, if any, that should be attributable to the defendant Union and the amount, if any, that should be attributable to the defendant Postal Service.

$30,000.00 Defendant Union

$17,000.00 Defendant Postal Service

Date: December 20, 1978

/s/ Charlotte B. Ives

Foreman

It is directed that said verdict be recorded. All parties will have ten (10) days from this date to file post trial motions.

Dated at Roanoke, Virginia, this 21st day of December, 1978.

/s/ James C. Turk
Chief United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
NO. 79-1455

Charles V. Bowen, Appellee,
versus
United States Postal Service, Defendant,
and
American Postal Workers Union; AFL-CIO, Appellant.

No. 79-1464

Charles V. Bowen, Appellee,
versus
United States Postal Service, Appellant,
and
American Postal Workers Union; AFL-CIO, Defendant.

ORDER

Filed March 6, 1981

Upon consideration of the motions of the United States of America, the United States Postal Service and the American Postal Workers Union, AFL-CIO, for enlargement of time to file peitition for rehearing with suggestion for rehearing en banc,

IT IS ORDERED THAT the motions are granted and the petitions for rehearing and suggestion for rehearing en banc must be filed in the office of the Clerk of this Court on or before *April 9, 1981.*

FOR THE COURT–BY DIRECTION
/s/ William K. Slate, II
CLERK

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1455

Charles V. Bowen, Appellee,

versus

United States Postal Service, Defendant
and
American Postal Workers Union, AFL-CIO, Appellant.

No. 79-1464

Charles V. Bowen, Appellee,

versus

United States Postal Service, Appellant,
and
American Postal Workers Union, AFL-CIO, Defendant.

ORDER

Filed May 29, 1981

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Bryan for a panel consisting of Judge Bryan, Judge Hall, and Judge Murnaghan.

For the Court,
/s/ William K. Slate, II
CLERK

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1455

Charles V. Bowen, Appellee,

versus

United States Postal Service, Defendant,
and

American Postal Workers Union; AFL-CIO, Appellant.

No. 79-1464

Charles V. Bowen, Appellee,

versus

United States Postal Service, Appellant,
and

American Postal Workers Union, AFL-CIO, Defendants.

Appeals from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Chief Judge.

Filed June 29, 1981

Upon motion of the United States Postal Service, by counsel, and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed pending application of the United States Postal Service in the Supreme Court of the United States for a writ of certiorari to this Court. The stay shall not exceed thirty (30) days unless the period is extended for cause shown.

Entered at the direction of Judge Bryan for a panel consisting of Judge Bryan, Judge Hall, and Judge Murnaghan.

For the Court,
/s/ William K. Slate, II
CLERK

APPENDIX H

CLERK'S OFFICE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNITED STATES COURTHOUSE
TENTH & MAIN STREETS
RICHMOND, VIRGINIA 23219

July 7, 1981

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Bruce Joel Jacobsohn, Esq.
Senior Assistant Regional Labor
Counsel
U.S. Postal Service Law Department
Philadelphia, Pennsylvania 19101

Re: 79-1455—Charles V. Bowen v. U.S. Postal Service (C/A 76-0255)
79-1464—Charles V. Bowen v. U.S. Postal Service (C/A 76-0255)

Gentlemen:

At the direction of the hearing panel, I enclose the opinion in these cases containing a rewrite of Page 7.

Copies of the opinion containing rewritten Page 7 are sent to Judge Turk and the Clerk of the District Court by copy of this letter.

Sincerely,

William K. Slate, II
/s/ Peggy L. McCulloch
By: Peggy L. McCulloch
Senior Deputy Clerk

PLM:sjb

Enclosure

Joint Appendix

Office - Supreme Court, U.S.
FILED
FEB 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-525

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES V. BOWEN,
Petitioner

v.

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 15, 1981
CERTIORARI GRANTED DECEMBER 7, 1981

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NOTICE

The Following Judgments', Order or Decisions of Courts' below, have been omitted in this Joint Appendix because they appear on the following pages in the printed Appendix to the Petition For Certiorari:

Opinion issued by U.S. Court of Appeals for the Fourth Circuit February 23, 1981 ..... A1

Judgment Order entered by the U.S. District Court for the Western District of Virginia on May 11, 1979 ..... A12

Findings of Fact and Conclusions of Law entered by the U.S. District Court for the Western District of Virginia on May 11, 1979 ..... A14

Special Verdict filed December 21, 1978, in the U.S. District Court for the Western District of Virginia A21

Order entered March 6, 1981 by U.S. Court of Appeals, granting defendants'-respondents' motions for enlargement of time to April 9, 1981 to file petition for rehearing with suggestion for rehearing en banc A24

Order entered May 29, 1981, by U.S. Court of Appeals denying defendants'-respondents' petitions for rehearing and suggestions for rehearing en banc A25

RELEVANT DOCKET ENTRIES

Date	
1976	*District Court*
Dec. 14	Plaintiff's Complaint
1977	
July 29	Plaintiff's Amended Complaint
Feb. 9	Answer of Defendant U.S. Postal Service to Amended Complaint
Sept. 12	Answer of Defendant American Postal Workers Union, AFL-CIO
Dec. 21	Special Verdict, dated 12/20/78 and filed 12/21/78
1979	
Jan. 2	Motion of Defendant American Postal Workers Union for Judgment Notwithstanding the Verdict or in the Alternative to Alter or Amend the Judgment
Jan. 24	Motion of Defendant for Involuntary Dismissal
May 11	Judgment Order entered 5/10/79 and filed 5/11/79
May 11	Findings of Fact and Conclusions of Law entered 5/10/79 and filed 5/11/79
June 11	Notice of Appeal filed by Plaintiff
June 12	Notice of Appeal filed by Defendant American Postal Workers Union, AFL-CIO
June 25	Plaintiff's Motion and Notice to Withdraw Appeal
June 25	Order Dismissing Plaintiff's Appeal Without Prejudice
July 18	Notice of Appeal by Defendant U.S. Postal Service
	Court of Appeals
Aug. 9	Case docketed

Date 1981	
Feb. 23	Opinion issued
April 9	Petition for rehearing filed by American Postal Workers Union
April 9	Petition for rehearing and suggestion that it be en banc filed by U.S. Postal Service
April 30	Opposition to petition for rehearing en banc filed
May 29	Order denying petitions for rehearing filed
July 22	Petition for rehearing and suggestion for rehearing en banc filed by Charles V. Bowen
Sept. 15	Order denying Bowen Petition for rehearing filed

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 76-0255

CHARLES V. BOWEN,
Plaintiff

v.

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Defendants

AMENDED COMPLAINT

(1) This is an action for breach of a union's implied statutory duty of fair representation as required by Section 9(a) of the National Labor Relations Act (29 U.S.C. § 159(a) and Section 301 of the Labor Management Relations Act (29 U.S.C. § 185). Jurisdiction of this court is based upon 28 U.S.C. § 1337 and 29 U.S.C. § 185.

(2) Plaintiff is a resident of the City of Lynchburg, Virginia

(3) The defendant, United States Postal Service ("Postal Service"), is an independent establishment of the executive branch of the government of the United States and is subject to suit under the provisions of 39 U.S.C. § 409.

(4) The defendant, American Postal Workers Union, AFL-CIO ("APWU"), is a labor organization within the meaning of the NLRA and LMRA.

(5) At all times material to this action, plaintiff was employed by the Postal Service and was a member of the APWU.

(6) During the period of plaintiff's employment, the APWU was recognized by the Postal Service as the agent of plaintiff, among others, for the purpose of collective bargaining. The collective bargaining relationship was evidenced by a written contract ("Agreement") between said parties during plaintiff's employment with the Postal Service.

(7) As the collective bargaining agent for plaintiff, the APWU had a duty to fairly represent plaintiff's collective bargaining interest and to refrain from acting arbitrarily, discriminatorily, or in bad faith in protecting said interest of the plaintiff.

(8) On February 21, 1976, the Postal Service erroneously charged that the plaintiff had assaulted a fellow employee and, as a result, the plaintiff was wrongfully and indefinitely suspended, without pay, by the Postal Service.

(9) As plaintiff's collective bargaining representative, the APWU knew or should have known, through its agents and employees, that grievances involving an employee's discharge are routinely referred to arbitration especially where, as here, evidence is readily available which would cause the penalty imposed upon plaintiff by the Postal Service to be mitigated by an arbitrator.

(10) Although the Agreement expressly provided a procedure by which plaintiff's grievance could be referred to arbitration, and in spite of its knowledge that grievances involving an employee's discharge are routinely referred to arbitration, the APWU failed to request that the plaintiff's grievance be submitted to arbitration.

(11) As stated by the APWU in its telegram dated August 17, 1976 (copy attached as Exhibit 1), the decision of its Arbitration Board not to proceed to arbitration was "based on the employee's [plaintiff's] past record" rather than the merits of plaintiff's grievance then

before the APWU. This telegram, a copy of which was not sent to plaintiff by the APWU, evinces the APWU Arbitration Board's arbitrary disregard of the merits of plaintiff's grievance.

(12) The failure of the APWU to adhere to the well established practice of referring grievances such as those of plaintiff here to arbitration, coupled with the APWU's admission that, if plaintiff's grievance was considered at all, it was rejected because of plaintiff's "past record" rather than considered on its own merits, constitutes arbitrary, discriminatory, and bad faith conduct on the part of the APWU.

(13) There are no further remedies which plaintiff can pursue under the grievance procedure provided by the Agreement.

(14) As a result of the APWU's arbitrary, discriminatory and bad faith failure to refer his grievance to arbitration, the plaintiff has been wrongfully denied all opportunity to have permanent, gainful employment with the Postal Service.

(15) Postal Service is joined in this action as a defendant so that the Court can make plaintiff's employer a part to any portion of the judgment herein which relates to plaintiff's employment rights and related benefits. Even if it ultimately held that plaintiff's employment rights with Postal Service have been irrevocably damaged by the APWU's arbitrary, discriminatory and bad faith representation of plaintiff, plaintiff is still entitled to a return and payment of benefits which have not been made by Postal Service.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of One Hundred Fifty Thousand Dollars ($150,000.00) compensatory damages,

plus interest and costs, and Fifty Thousand Dollars ($50,000.00) punitive damages.

Trial by jury is demanded.

Respectfully,

CHARLES V. BOWEN

By: /s/ Haney H. Bell
Of Counsel

Haney H. Bell
Woods, Rogers, Muse, Walker & Thornton
105 Franklin Road, S.W.
Roanoke, Virginia 24011

Counsel for Plaintiff

[Filed July 29, 1977]

[TRANSCRIPT OF COURT PROCEEDINGS
(December 19-20, 1978)]

* * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

* * * *

Before: The Honorable James C. Turk,
Chief District Judge

* * * *

[50] CHARLES VERNON BOWEN,

the Plaintiff called in his own behalf, being first duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. POFF:

Q. Would you identify yourself, please sir?
A. Yes, my name is Charles Vernon Bowen.

* * * *

[72] Q. What contact, if any, did you have with your local union about this matter?

A. Well, after receiving the March 15th letter [73] from the Post Office, I contacted my shop steward, my union steward.

Q. And who was that, sir?

A. Mr. Robert Carr.

Q. And was a grievance filed by you or on your behalf?

A. Yes, there was.

Q. Did Mr. Carr take care of that or did you do it yourself?

A. Well, Mr. Carr took care of that.

Q. Did you rely on him to do that?

A. Yes, I did.

Q. Now what—let me call your attention to—did you tell Mr. Carr what had happened?

A. I told him precisely what had happened, I made a statement to him.

Q. Did you give Mr. Carr a written statement?

A. Yes, I did.

Q. Was that statement made part of the record to your knowledge?

A. Yes, it was. It was given ultimately to the postmaster.

Q. Mr. Bowen, I show you what purports to be a typewritten letter signed by you, and ask you if [74] that was a written statement on this incident that you gave Mr. Carr?

A. Yes, sir, that's correct.

Q. I see there is a pencil date with the initials R.W.C. Are those Mr. Carr's initials?

A. Yes, sir.

Q. The date is 5-3-76, apparently May 3, '76. Was that the date you prepared that letter?

A. No, I prepared this earlier, but when we presented it to the postmaster, I remember him putting the date on it.

Q. Do you know approximately when it was prepared after the March 15 letter to you?

A. Yes, I would say it was around March 24th or 25th.

Q. Well, without attempting to be precise, was it within the same month that you got the letter.

A. Yes, sir.

* * * *

[81] Q. Now, after you talked to Mr. Carr, do you know of your own knowledge if the grievance was filed?

A. Yes, sir. He filed a grievance under equal opportunity discrimination.

Q. Did you have anything to do with that other than to go along with it?

A. Well, I told him this was getting religion, and he named over a couple or three, race, color, creed and re-

ligion was a sort of intimate situation with [82] that I didn't care to bring out. If I were going to make a grievance on this case, it would stand on its merits, and not on whether someone was discriminating against me because of my religion.

Q. And was Mr. Carr insistant on filing this or was it dropped?

A. He said this was the only way to approach it. He said this was the only way we can get you—get this case heard.

Q. Now, were you later—was a grievance filed under the contract here or not other than this E.E.O. charge?

A. No, at this time, because Mr. Ralph Perry with whom I carried mail with in Roanoke, came to Lynchburg as an E.E.O. Officer.

Q. Do you know what was going on, if anything, with regard to Mr. Carr's investigation of the matter and the processing of the grievance?

A. Not—just what he would tell me. I didn't say anything to anybody.

Q. Did you just leave it in his hands?

A. Absolutely.

Q. Did you have an alternative to proceeding through the grievance procedure under the contract?

A. Well, yes, being a veteran I could have [83] taken it to the Civil Service Appeals Authority. I could have gone in that direction.

Q. And why did you choose not to go in that direction?

A. Because Mr. Carr told me this was the right approach.

* * * *

[85] Q. Now, Mr. Bowen, it has been stated in open statements that a union officer came down to work with Mr. Carr and investigate this matter, a gentleman by the name of Mr. Romaine. Do you know anything about that?

A. Yes, sir. I know Mr. Romaine.

Q. And it has been stated that you did not cooperate with Mr. Romaine. Would you tell the jury what happened about that?

A. Mr. Romaine was—I was told by Mr. Carr that Mr. Romaine would be at the Holiday Inn South on a Monday evening. And that he would meet with him prior to my coming over, and they would call me from there. On Monday afternoon about four o'clock. I was informed that Mr. Romaine couldn't make it but he would be in on Tuesday evening. And that he would call me after he had had a chat with Mr. Romaine.

Q. Did he come on Tuesday?

A. He came on Tuesday, and I waited by the phone, and about 7:30 I got a call from Mr. Robert Carr [86] who said that Mr. Romaine would like to talk with me. He wanted me to come on over.

Q. And did you go over?

A. Yes, sir.

Q. And what discussion took place?

A. After, you know, Mr. Romaine had his boys there, and after getting acquainted, some small talk, we started discussing this case.

Q. Did you give him a statement about it, or had you already given him one?

A. I had already given him one and I showed him every piece of paper that I had from the day I started to work at the Post Office.

Q. Now what were you told, if anything, by Mr. Carr and Mr. Romaine about your grievance being processed?

A. Well, it wasn't exactly that approach, but I was to understand at the latter part of the meeting, I went to the car to get the forms from Mr. Perry's E.E.O. findings, Equal Opportunity findings because I had asked Mr. Romaine in particular if he would like to see those. And also a Mr. Rakes, I believe it was, R-A-K-E-S—but anyway I showed him everything that I had. I was—

THE COURT: When was this, when did [87] Mr. Romaine come to—you said it was on a Tuesday?

A. It was on a Tuesday, it was the day after or two days after Memorial Day, so it was the first part of June of 1976.

Q. Now, what did you learn, Mr. Bowen, if anything about how this matter was progressing with the grievance procedure?

A. Well, that was Mr. Romaine's function; he came down to get the story first hand.

Q. Well, what if anything did they tell you about what was being done with your grievance?

A. Well, it wasn't a question of that, it was a question of what we parted, when we shook hands he said he was going to do everything he could to stop this short of arbitration, that he was going to the Post Office floor and talk to the people at the Post Office, and that I'd be hearing from him.

Q. And did you ever hear anything from him?

A. No, sir.

Q. Did you hear anything further from Mr. Carr about this?

A. No, about that time, Mr. Carr—let's see, this was in June, and Mr. Carr was preparing to go to Las Vegas to a convention, and he was sort of wrapped up in that at that time, but he did, he gave me [88] he gave me the feeling that maybe I should just relax a little bit and let it take its course, and that he would keep me apprised of everything that went on.

Q. What did you ever learn if you did about the final disposition of your case?

A. I think that the next time that I spoke to Mr. Carr was that he related to me that Mr. Walter Kenney who was in Richmond, he had discussed it with him. And Mr. Kenney had related to him that he was sending the case on up, and that it would go before arbitration. And there wasn't any question in Mr. Carr's mind at that point that Mr. Kenney had given him his assurance that we had a good case, and it was just a matter of time.

Q. And what did you next learn about your grievance?

A. Well, it was after—it was after the national convention, I think that was the first of August, the first two or three weeks of August.

Q. What did you learn and how did you learn it?

A. Well, I had to call Mr. Romaine in Charleston, West Virginia. I called his home in Parkersburg, and his wife told me where he was, and I called him at the Holiday Inn in Charleston, West Virginia. [89] He happened to be there on that day, and I asked him about my case, and then that's when he—

Q. What did he tell you?

A. He told me he was sorry about my case not going to arbitration.

Q. And what other comments if any did he make to you?

A. Well, he—I found Mr. Romaine to be a very nice person, very personable. And he told me that he had recommended that my case go to arbitration, and that he didn't know whether I should see someone else or maybe speak to my Congressman, that sort of thing.

Q. Did he suggest that perhaps you should see your Congressman?

A. He suggested that that would be one avenue.

Q. Did you do that?

A. Yes, sir, I did.

Q. Did you have any lawyer in the picture at that time?

A. No, sir.

* * * *

CROSS EXAMINATION

BY MR. GERSH:

[125] Q. Now when you learned that the Postal Service was going to discharge you for your assault on Mr. Morris, you went to Mr. Carr, is that correct, sir?

A. When I found out that they were going to put me on indefinite suspension, yes, I did.

Q. And Mr. Carr is with the American Postal Workers Union, the local?

A. That's true.

[126] Q. And he's the local president of the union.

A. Yes, sir.

Q. And did Mr. Carr tell you that he would help you, try to help you to get your job back?

A. He certainly did.

Q. And did Mr. Carr make every effort that he could to try to help you get your job back, sir?

A. As far as I know Mr. Carr did everything that—

Q. Did you ever buy him a stetson hat in appreciation of the work that he was doing?

A. A stetson hat?

Q. Yes, sir.

A. I gave him a white hat because I said, you know, all nice guys should have a white hat.

Q. You bought him a white hat?

A. Yes, I did.

Q. And did you tell him it was in appreciation of what he was doing?

A. I didn't say anything other than to say that all nice guys should wear a white hat.

Q. So you thought that Mr. Carr, the union president was a nice guy?

A. I—yes, I did. I knew what he was working under.

[127] Q. Well, when Mr. Romaine came down here had you ever met Mr. Romaine before?

A. No, sir.

Q. How did he introduce himself to you?

A. He was sitting in a room in the Holiday Inn, and when I got over there he and Robert Carr were in the room.

Q. Did you know that he was a union representative.

A. I'm sure I did. Of course, I had been waiting for him to come down.

Q. Now why wouldn't you tell Mr. Romaine about what happened on that day, sir, with you and Mr. Morris?

A. I think I made the point before that I not only told Mr. Romaine everything I knew, I went to the car and got papers from the EEO investigation and brought them up to the room. And I don't know really—I don't know what else I could have done, and I—

Q. Did you tell Mr. Romaine that you pushed Mr. — when you had an altercation with Mr. Morris? Did you tell him that you did?

A. I told him exactly what I was accused of. I told him exactly how it happened, how—my perception of it, and he told me after—I don't know, we were [128] there forty or fifty minutes.

Q. And were you aware that Mr. Romaine then went and interviewed other people who knew this incident?

A. He told me he was; he told me he was that night.

Q. Why have you sued the union in this case? What do you claim the union did wrong to you, sir?

A. The union hasn't done anything for me.

Q. What do you claim that the union did that was wrong that entitled you to recover some damages?

A. I think it is evident. I have been off from work for three years or nearly. Until just fairly recently, I found my situation where it wasn't in good faith that the union failed to arbitrate my case. And I have not only been a member of this union, but also of the letter carriers' union.

Q. What do you mean by good faith? You say in good faith, they didn't arbitrate your case?

A. If they weren't going to arbitrate my case, they should have told me. They should not have left me in limbo this long.

Q. Is that what is bothering you, that you weren't told that your case was not going to be arbitrated?

[129] A. Well, I think that if I held up my end of the bargain with the APWU that they certainly should have held up their end of the bargain.

Q. And what was that?

A. Well, they solicited my membership and I read the agreement, and I joined it, and I solicited their help in the same spirit.

Q. Well, what does that mean, sir? Does that mean that you think that because you filed a grievance, you are automatically entitled to have that grievance arbitrated?

A. Well, I think I was unjustly accused, and I think that had they examined this situation more closely, and everything had been up and above board, I certainly wouldn't have been off for three years without pay.

Q. What do you mean examined the situation more closely? For example, sir, what should they have done?

A. Well, my local steward was handicapped. He was handicapped from the beginning. He didn't have the money; he didn't have the support from the National, and hadn't—

Q. Well, I mean you say he didn't have the money—

[130] A. Well, now you are geting very technical.

Q. Yes, sir, I sure am.

A. All right.

Q. I want to know what you think my client did wrong?

A. And—and—I think when Mr. Carr gets on the stand he will explain it very technically.

Q. Well, now, Mr. Carr is not the Plaintiff here, and I'm asking you in very specific terms what the union did that you think was improper in this case.

MR. POFF: If Your Honor please, he's already said they didn't take his grievance to arbitration.

THE COURT: I think you ought to ask him one other question. What did it fail to do that he think it should have done.

Q. All right, then what did the union fail to do that you think they should have done, sir?

A. All right, — my — the incident as they so call it and outline it in this letter, I have responded on March the 19th and have proved the first paragraph about the assault accusation has nothing to do with my March the 19th letter. But paragraph 2 about the scheme failure, and paragraph 3 about the failure to come in, I couldn't even be on the premises. And in my March the 19th letter I stated those facts.

• • • •

[229] GLADYS WILKES JOHNSON,

a witness called on behalf of the Plaintiff, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HARRIS:

Q. Mrs. Johnson, will you tell the jury and the Court your full name and your current address, please ma'am?

A. Yes. My full name is Gladys Wilkes Johnson, and my current address is 955 35th Street, Northwest, Roanoke, Virginia.

Q. Are you currently employed, Mrs. Johnson?

A. Yes.

Q. What is your present employment and your position?

A. I'm employed at I.T.T. on Plantation Road, and my present position is a supervisory capacity.

Q. How long have you held that position as a Supervisor, Mrs. Johnson?

A. About two and one-half (2½) months.

Q. Prior to being a Supervisor for I.T.T. here in Roanoke, what was your position?

Q. I was in the bargaining unit there, and my position in the bargaining unit was just an hourly employee. I was a glass worker.

[230] Q. And how long were you employed by I.T.T. as an hourly employee?

A. It will be twenty (20) years this coming June. About nineteen and one-half (19½) years.

Q. You were promoted then to Supervisor just before reaching your twentieth (20th) anniversary?

A. Right. My birthday present.

Q. Is I.T.T. organized by a labor union, Mrs. Johnson?

A. Yes, they are.

Q. What labor organization is that?

A. The International Union of Electrical Radio and Machine Workers.

Q. And does it have a local number?

A. Yes, the local number in the plant is Local 162.

Q. How long has Local 162 represented the employees at I.T.T., Mrs. Johnson?

A. For the past twelve (12) years.

Q. During those twelve (12) years, Mrs. Johnson, did you hold positions as an officer for Local 162?

A. Yes, I did, from the very beginning, in fact, including the twelve (12) years just previously to being promoted to Supervisor, I held the capacity of one of the top offices, Recording Secretary, and also [231] as President of the Local.

Q. How many of those twelve (12) years, Mrs. Johnson, did you spend as President of Local 162?

A. Six (6) years.

Q. During those six (6) years as President of Local 162, Mrs. Johnson, what were your responsibilities with regard to the processing of grievances and the handling of arbitration for Local 162?

A. Well, even as President, and also as Recording Secretary, I was a member of our grievance committee, who views the grievances, once they have reached the second step level, and we have to make a decision whether to recommend arbitration or withdraw the grievance.

• • • •

[232] BY MR. GERSH:

Q. Mrs. Johnson, have you ever been employed by the United States Postal Service?

A. No, I haven't.

Q. Have you ever worked in the Collective Bargaining Unit at the—have you ever worked for the American Postal Workers Union?

A. No, I haven't.

Q. Have you ever reviewed any grievance files within the American Postal Workers' Union other than the file you have in front of you?

A. I have had the opportunity to discuss grievances that were processed with American Postal Workers' and I know personally the President, and I think the officer holding the other rank is Recording Secretary of the Postal Workers' here in Roanoke.

Q. You know them?

A. Personally, yes.

Q. You know them personally?

A. Both of them, yes.

Q. Have you ever discussed the processing of [233] of grievances with any national officer of the Postal Workers' Union?

A. No, I haven't.

Q Are you familiar with the way grievances are processed within the National Office at the American Postal Workers' Union?

A. Yes, I have a copy of the National Agreement.

Q. I see.

A. And have had for a number of years.

Q. Do you have that copy with you?

A. No, sir, I do not, it's at home.

Q. All right. Do you know what crafts the American Postal Workers' Union represent?

A. Yes, they—well, not all of them, maybe, but they represent quite a number. I know that they have the letter carriers; I know they have the clerks; I know they have the window technicians, and the mail handlers.

Q. You say the American Postal Workers' Union has the letter carriers?

A. Well, the letter carriers and the craft—I know that they have two different unions. Even here in Roanoke, they have two different locals. One, I believe for the clerks, window technicians, and then [234] for the mail carriers or letter carriers.

A. And what union does the—or what workers does the American Postal Workers' Union represent now?

A. What workers?

Q. Yes, what bargaining unit workers?

A. They represent all except the supervisory capacity, I believe.

Q. And the letter carriers?

A. And the letter carriers are also represented by A.P.U.W.

Q. Oh, they are?

A. That I believe. Now, I know as far as the craft because my husband is employed with the U.S. Postal Service and he is a member of the Craft Union here in Roanoke.

* * * *

[237] MR. JACOBSOHN: I just have a few questions.

BY MR. JACOBSOHN:

Q. Just as to what you have done in terms of your local. You indicated that there was some sort of committee that reviews grievances. Now, these are the grievances from your individual shop?

A. Yes.

Q. About how many employees in that individual shop, ma'am?

A. In the shop is approximately—in the bargaining unit—

Q. Yes, ma'am.

A. In the shop there is a number of people; in the bargaining unit there is approximately four-hundred

and thirty (430) employees; that would be more or less; I believe more.

Q. Do you know how many employees are covered by the bargaining unit Mr. Gersh's referring to?

A. Which bargaining unit is Mr. Gersh referring to?

Q. What is the bargaining unit of the Postal Service; how many people, do you know?

A. In the entire Postal Service in the—

[238] Q. Okay, now, let me go back. Do you know what the bargaining unit is in the Postal Service?

A. The bargaining unit, I would assume, and there again is my own opinion, as in most places is the people who are paid by the hour, not in management category.

Q. Where, in the local facility, in the State of Virginia?

A. Well, I know that they have locals in each area, and I'm sure they have a National, and I know they have Regions and—

Q. What's the bargaining unit, ma'am?

A. The bargaining unit would be all employees who work by the hour is the way I would define a bargaining unit.

Q. For what facility?

A. Whether it be the Post Office or I.T.T. or—

Q. It's my fault, ma'am, I'm not—let's put it down to a different level—

A. Okay, if you'll ask me the exact question and you want the answer, I'll see if I can come—

Q. Okay, I know, I know you are trying and I'm trying to do it a a level we'll understand each other—

A. Thank you.

[239] Q. In terms of your bargaining unit, the I.T.T., the determination as to who handles grievances is handled by the Local who processes the grievance?

A. Now, we have counsel from our National Office.

Q. Do they make the determination as to which goes on to arbitration and which don't?

A. They leave the biggest decision to the local people because they are there where it is happening, and you should be more familiar with the grievance and the background of the person involved or the persons involved.

• • • •

[240] (In the absence of the jury the following transpired)

MR. GERSH: Your Honor, in all due respect to Mrs. Johnson, Mrs. Johnson's qualifications seem to be that she is a local union officer in another bargaining unit and for I.T.T. She erroneously stated that the American Postal Workers' Union represented the letter carriers. I don't think she has even the remotest qualifications to express any kind of opinion concerning the handling of this grievance. And I think that if the Court will allow me to ask a few more questions of this—

• • • •

[248] THE COURT: All right. Ask the Marshall to bring the jury back.

Let the record show that Counsel for both Defendants strenuously object to this witness expressing any opinion.

MR. JACOBSOHN: Your Honor, as an expert.

THE COURT: Well, the Court finds that by training and education and experience, she can express and opinion in this field.

(Jury returns to courtroom)

DIRECT EXAMINATION IS RESUMED

BY MR. HARRIS:

Q. Mrs. Johnson, did you at the request of Mr. Poff review an arbitration file or grievance file related to Mr. Charles Bowen?

[249] A. Yes, I did.

Q. Do you have a copy before you of what you did review?

A. Yes, I do.

Q. In the interest of time, Your Honor, I would ask permission to submit a duplicate of that with numbered tabs similar to those which the Court has, to Mrs. Johnson.

THE COURT: All right, this is a copy of Court Exhibit No. 1, is it not?

MR. HARRIS: Court Exhibit No. 1 which I believe the Court has, and it will speed the examination of Mrs. Johnson along, I believe, to refer to the numbered tabs.

THE COURT: All right.

MR. GERSH: Your Honor, could we have that document marked and introduced since that is not the same document which is now serving as Court's Exhibit No. 1?

MR. HARRIS: That's agreeable with Counsel.

THE COURT: Wait a minute. You can take the Court's, as I understand it, and mark it and substitute it as Court's Exhibit No. 1.

MR. GERSH: No, let's have it as Court's Exhibit No. 2, since they aren't the same.

[250] THE COURT: All right.

MR. HARRIS: Well, I'll just put it down here and will count as Court's Exhibit No. 1.

THE COURT: It doesn't have the tabs.

MR. HARRIS: I would like to have the numbered tabs; that's in the interest of time, Your Honor.

MR. GERSH: Well, would you mark that—

THE COURT: Mark this one Court's Exhibit No. 2.

(Tabulated file received and marked as Court's Exhibit No. 2.)

BY MR. HARRIS:

Q. Mrs. Johnson, I now hand you Court's Exhibit No. 2, which in the interest of time would represent to be what you looked at, but as you go through it, if you come

across anything that is different from what you reviewed, please so inform the jury.

A. All right.

Q. Now, how long did you spend reviewing this grievance file of Mr. Bowen, Mrs. Johnson?

A. Well, it took a number of hours. I read through it; it took about, I would say, four (4) hours really. And of course, I'm not a speedy reader, but I try to absorb what I am reading. And [251] it took about four hours to read it, and then I reviewed it again, and picked up the points I wanted to go back and look at again, and I would say, all total, approximately six (6) or seven (7) hours.

Q. Did you reach an opinion in the course of that review, Mrs. Johnson, as to the manner in which this grievance was handled, or whether or not in your opinion, it should have gone to arbitration?

A. Yes, I did.

Q. What was that opinion, Mrs. Johnson?

A. After going over, as I said, in reviewing and making notes of things that I picked up, my opinion that I reached was the grievance should have gone to arbitration, and allowed Mr. Bowen a fair and just hearing before a partial—an impartial, I'm sorry, before an impartial party as to whether he had been unjustly treated by the U.S. Postal Service.

Q. All right, now, Mrs. Johnson, in order that the jury can fully understand your opinion, I'm going to refer you to certain tabs that are numbered in the documents there. If, as we come to the tab, in each case, if you would identify the documents for the jury and tell them what significance, if any, that document has in your decision?

[252] A. I'd be glad to.

Q. Let's look first at Document No. 9 in the grievance file: can you identify what that appears to be?

A. Yes, Document No. 9 appears to be a hand-written statement from a party named "Bob".

Q. And?

A. And it refers to the incident of Charles Bowen.

Q. What significance did this document play in forming your opinion?

A. When I read the portion—may I read to the jury the portion that hit me as being very important for the person who made the final decision to be sure they heard?

Q. Yes, ma'am.

A. (Reading from document)

> "Be sure to listen to the tape of R. B. Morris, also of Roland Bagley. I think they may be of great value."
>
> And at the bottom, it says, "Thanks, Bob". And this was received on May the 5th, 1976, by the initial of W. T. K., which going through the file here is a Mr. Kenney.

Q. Were either of those tapes from Mr. Morris or [253] Mr. Bagley available to you at the time you reviewed this file, Mrs. Johnson?

A. No, neither of the tapes was available, however I had a transcript of the tape of Mr. Morris.

Q. Did you review that transcript?

A. Yes, I did.

Q. And did you reach an opinion out of the content of that transcript as to what this person named Bob was advising someone about?

A. Yes, it appeared to me that it was very important to Bob when he listened to the tape that Mr. Morris was a reluctant employee to even make a sworn statement to the fact, or Mr. Morris, himself, was saying this. It was a tape between, apparently the president of the local union there in Lynchburg, a Mr. Carr, and the employee, Mr. Morris.

And he was more or less saying that there was something that he didn't quite understand that he even had to make a sworn statement to the Postal Inspector, Mr. Via, against Charles Bowen. And that he felt there was

some sort of stacking of the cards going on against Charles Bowen.

Q. Mrs. Johnson, in your prior handling of grievances, if you had come across a letter of this sort, and the tapes had not been there, what would [254] you have thought would be a necessary step to handle this properly?

A. I would have gotten in touch with Bob and asked him why he failed to send me the tapes that he wanted me to look at or listen at, I'm sorry.

Q. All right. I invite your attention to Tab No. 26?

A. All right.

Q. Can you tell the jury what that document appears to be?

A. This document is a typewritten document started: "To Whom It May Concern", and it is by an employee, Mr. Wright. It appears to be a fellow employee of Mr. Bowen or a fellow co-worker.

Q. And what is the substance and significance, if any, of that document, Mrs. Johnson?

A. Here again is a co-worker who's working very closely with Mr. Bowen and also knows the management of the Lynchburg Postal Service who is strongly objecting to the way that Charles Bowen has been treated by the supervision in that post office. Not only just Charles Bowen, but he referred that other people, you know, had been treated unfairly. And he also mentions one Supervisor, Frank Murray, by name, who he feels is trying to make a case against [255] Charles Bowen.

Q. In reviewing a record for a decision to go to arbitration, Mrs. Johnson, to come across a document of this sort, what would it tell you?

A. It would tell me that I needed to turn every stone there was to find out whether Charles Bowen was unjustly treated by the Postal Service, or if the Postal Service was justified in their action.

Q. What's the normal step, Mrs. Johnson, for turning every stone to find out whether an employee has been unjustifiably treated?

A. Well, you talk—I can only give you what we do in our Local as far as turning the stones to find out. We—

MR. GERSH: Your Honor, I object, if she cannot express an opinion, other than from her own experience, then it's not an expert opinion.

MR. HARRIS: I'll rephrase the question.

THE COURT: All right.

BY MR. HARRIS:

Q. Would the statement of Mr. Wright, at Tab 26, which spoke of harrassment, play a part in your decision to take this case to arbitration?

A. Yes, it would.

Q. Now, I invite your attention to Tab No. 20: [256] I'll ask you if you'll identify very briefly for the jury what that document is?

A. It's a document with the titling "United States Post Office, Notice of Charge Removal to Charles V. Bowen".

Q. Does it list three charges on there?

A. Yes, it's dated March the 15th, 1976, and it notifies him that he is—the proposal to remove him from the Postal Service, and lists the three reasons why.

Q. All right, now, referring to the first reason, in very short summary fashion, is that the "Morris incident"?

A. Yes.

Q. Now, I invite your attention to Tab No. 12: What is Tab No. 12?

A. Tab No. 12 is a letter to Walter T. Kenney from Robert W. Carr, President of the Lynchburg Local.

Q. And does it relate to the Bowen Case?

A. Yes.

Q. And what in that document is of particular interest or was of interest to you as you reviewed this file?

A. Here again he's expressing what he feels [257] on the charges. Charge No. 1 dealt mainly with the Pro-

cedures of schemes, or other than Charge No. 1 dealt mainly with the Charges of Schemes, and No. 1 Charge had no witnesses to substantiate whether it was an actual physical assault made on Mr. Morris by Mr. Bowen.

Q. Do you know who—reading from the file, do you know who Mr. Kenney is?

A. Mr. Kenney, I believe, is the Regional Representative for the Union.

Q. And what part would it play in your decision whether this case should go to arbitration when someone in the arbitration system is saying as to the main charge—Charge 1, excuse me. As to Charge 1, there are no witnesses, what would that mean to you in your decision, if anything?

A. Well, it would mean to me that Mr. Bowen had a good chance of winning his arbitration or the case should go to arbitration, and he would have a good chance of winning the arbitration case. Because without a witness, you've got two people: one saying I did; and one saying, I didn't, even though there may have been some type of infraction between them. And I don't think you can build a case on, you know, hearsay. You've got to have witnesses.

[258] Q. Mrs. Johnson, I refer you back again to Charge—Tab 20, the notice of charges which were the three (3) charges that you just testified to: turning now, to Item No. 3, would you read that brief item to the jury, please?

A. Yes. Item No. 3 states "that you "failed to report for your regular scheme examination on City A. You were given a failure and rescheduled for April the 2nd, 1976."

Q. Now, if you knew, Mrs. Johnson, that Mr. Bowen passed the examination on April 2, 1976, what would that do to any decision you might have?

A. Well, it appeared to me that they were using something here, as far as his rescheduling on April the 2nd, and this is a letter dated March the 15th, and they

are using that as part of the reason for removing him from the Postal Service, that they are a bit ahead of schedule.

Q. When does the letter of March the 15th propose to remove him, does it say right there in that letter when he should be removed?

A. Yes, it says no earlier that thirty (30) days from the date which is no earlier than thirty (30) days from March the 15th.

Q. When would that be, Mrs. Johnson, [259] approximately?

A. Thirty days would be approximately the 15th of April.

Q. And now I invite your attention to Tab Number 16: Can you identify for the jury that document, please?

A. Yes, this is a letter of decision.

Q. What decision was reached and when was it reached?

A. It was the decision to remove Mr. Bowen from the Postal Service, and it was dated March the 30th, fifteen (15) days after the previous letter dated March the 15th.

Q. With particular regard to Charge No. 3 in which Mr. Bowen was given a rescheduled opportunity for April 2, 1976, Mrs. Johnson: what part, if any, does Document 16, a decision of March 30 to remove him; and Document 20, the charges of March 15, play in your decision?

A. The part these two documents play is like the Number 1 he received March the 15th with the proposed reasons for removing Mr. Bowen from the Postal Service. And no later—no earlier than thirty (30) days, and using April the 2nd date of his rescheduling to take his scheme examination, they [260] remove him from his duties as a Postal Worker prior to allowing him to take that scheme examination. Which would lead me to believe that somewhere along the way they are cutting him off at the pass, so to speak.

Q. And I invite your attention to Tab Number 23: And I ask you if you can identify that for the jury, please, ma'am.

A. Tab 23 is again a letterhead of the U.S. Postal Service; the subject is "Investigation of Conduct of Charles Bowen, part-time flexible Distribution Clerk" dated March 11, 1976.

Q. And looking at the third page of that, Mrs. Johnson, can you tell who generated that report?

A. That report was generated by the Postal Inspector, Mr. Via.

Q. Now, on page two (2), there are two (2) items there: six (6) and seven (7), can you identify those for the jury, please?

A. Number six (6) states that on February the 23rd, 1976, that Mr. Via had interviewed a Distribution Clerk by the name of Mr. Verdinella. I'm not sure how to pronounce the name, and I apologize for that inability. Is it Verdinella?

Q. That's an incident involving Mr. Verdinella?

[261] A. Yes, Verdinella.

Q. And Item Number 7, is that listed?

A. Yes, it's an incident also involving a James J. Doss, who was interviewed by Mr. Via.

Q. And in reviewing this file further, did you find any other reference to any discipline at the time that there was an incident involving Mr. Verdinella or Mr. Doss—any discipline at all for Mr. Bowen?

A. No, and it was quite—it stuck in my mind quite clearly that—why was this a part of the record now when no disciplinary action was taken at the time these proposed incidents happened.

Q. What, in the context of your decision to arbitrate this case, does that mean, Mrs. Johnson? That Mr. Bowen had never been disciplined when these much earlier thing happened as Mr. Via reported?

A. Well, it indicated to me again, after the full file that I went over, that somebody here again was trying

to be sure that they had sufficient evidence to release Mr. Bowen from his duties as a Postal Worker.

Q. In your experience with arbitrators, Mrs. Johnson, and in your course of evaluating a case—whether to take it to arbitration or not—what is your [262] opinion of incidents in the past, which are not the subject of discipline, which are then brought up in the course of a current charge?

A. Well, it has been my experience, ladies, that in arbitration cases that we've presented, that you stuck to the subject of that particular grievance and for the reason for that particular grievance.

Q. Now, I invite your attention to Tab 22: I ask you if you can identify that document to the jury, please, ma'am?

A. Yes, this is the letter to Mr. John Ripley, the Postmaster from Lynchburg, Virginia from Mr. Via, the Postal Inspector; it's dated March the 11th.

Q. And is it a transmittal of the investigative memorandum which you have just been referring to?

A. Yes.

Q. And what does the last sentence in that document read?

A. (Reading) "As soon as additional evidence is available for release, I will furnish it to you in supplement investigation memorandum."

Q. In your review of this file, Mrs. Johnson, did you find a supplemental investigative memorandum that Mr. Via promised Mr. Ripley?

[263] A. No, I did not.

Q. And the date of this letter is March 11, 1976?

A. Yes, sir, it is.

Q. And what is the date of notice of charges?

A. The date of notice of charges is March the 15th.

Q. Four (4) days later?

A. Four (4) days later, right.

Q. I invite your attention to Tab No. 7: can you tell what that document is?

A. It's an American Postal Workers' Report of Regional Decisions; Step 2-B.

Q. And is there an area on there for a comment or a recommendation by the union representative?

A. Yes, it is.

Q. And what is that comment by the union representative in that report?

A. The comment by the union representative states: "penalty too harsh; I did not question whether the act took place or not. The statement of the employee of his condition shows something happened."

Q. Can you tell from that document who originated it?

A. Yes, the document was originated by the [264] initials, "CFR", I believe his name was Rhiner.

Q. If you don't—

A. I have read the name throughout the whole thing because in reviewing it, the name came up, and the initial there is "CFR".

Q. Is the initial the same as a name that appears in the file, the "CFR" initials that you are referring to on that document, are they the same as a name of a person that appears in this file?

A. A Mr. Romaine?

Q. Yes, ma'am.

A. Okay.

Q. Now, I invite your attention to paragraph—Tabs 4 and 5: I ask you if you can identify that—those two?

A. 4 and 5, Mr. Harris?

Q. Yes, ma'am. First, take 4.

A. All right. Thank you. No. 4 is a letter to Mr. Emmett Andrews, Director of Industrial Relations, A.P.W.U., in Washington, D.C.

Q. Who is it from?

A. The letter if from Walter T. Kenney, National Vice President.

Q. And do Mr. Kenney's initials, "WTK" appear on a number of these documents through here as [265] received?

A. Yes, yes, they do; quite a few of them.

Q. What does Mr. Kenney say to Mr. Andrews in the national union in this letter?

A. It requested that Mr. Andrews consider the above grievance appeal for arbitration in regards to an adverse step of 2-B decision letter, dated on July 14, 1976.

Q. Does he say what his reasons for that are in that letter of Tab 4?

A. His reasons for the request was included in his union report of Step 2-B Hearing.

Q. I invite your attention now, to Tab 5, Mrs. Johnson, and ask you the title of that document up at the top?

A. "APW Union Report of Regional Decision, Step 2-B".

Q. And do some initials show on that document as to who originated it?

A. The originator is "WTK", and the initials, I'm assuming, is that of Walter T. Kenney.

Q. And on that document, is it similar to the one that Mr. Romaine put in handwriting in foremat? It's the same foremat as the one that Mr. Romaine wrote, is it not?

[266] A. Yes.

Q. Now, at the bottom of that one there is again a personal comments, union representative, is there not?

A. Yes, it is.

Q. Will you read the comment of Mr. Kenney that he made to Mr. Andrews? Read that comment to the jury.

A. All right. Mr. Kenney's comment was, "I'm requesting that the APW Arbitration Board consider, review, and certify this case for arbitration. The removal is not for just cause."

Q. Could you in reviewing this file, Mrs. Johnson, reach an opinion as to whether or not people below the national level had recommended that it go to arbitration?

MR. GERSH: Objection, Your Honor, the file speaks for itself.

THE COURT: I think that the file speaks for itself. I sustain that objection.

BY MR. HARRIS:

Q. Turn to the reference to Tab No. 8, Mrs. Johnson:

A. All right.

Q. Could you tell what those were, Mrs. [267] Johnson, that Tab 8; there are two pages on it.

A. All right. Tab 8; I was looking at the one. Tab 8 is also a Union Report to Mr. Kenney from Mr. Romaine.

Q. As an entry to a file that you'd consider for arbitration, what do these notes speak about, and what do they indicate to you in connection with the decision to arbitrate this case?

A. His handwritten notes, ladies, on the back in going through the file here, you have a form with the back page where he had written handwritten notes, and it was referring to other co-workers' opinion of what had happened to Mr. Bowen.

Q. Now, references to Mr. Bagley and Mr. Jones?

A. Yes, there are references to those two, Mr. Jones and Mr. Bagley.

Q. Mrs. Johnson, taking into account what you have just looked at and all of the tabs that we have referred to, and all of the remainder of the file which you have reviewed, what is your opinion as to how the union handled this case if you knew that they did not take it to arbitration?

A. I would be quite surprised to learn that they did not take the grievance to arbitration after [268] reviewing what had happened from day one, when the griev-

ance was filed, and the opinion of the co-workers, and also the local union officers who were working day to day near, or in and around the area, with Charles Bowen where he should have had a fair and just hearing. Because their opinion, if I may add—

Q. What is your opinion, Mrs. Johnson, as to an approximate amount of time that it would take to reasonably consider the detailed dates and documents which you reviewed? How long would it normally take someone, do you think?

A. To go over the documents that I have here?

Q. In the detail that we've just discussed them with the jury?

A. It would take quite sometime. Like I said I wasn't familiar with their procedures; I only knew my own, but I knew, you know, most of them I feel are basically the same. And I'm familiar with other international unions, and it would take a number of hours to sit down and make a thorough investigation and decision as to whether this was a proper grievance for arbitration or not.

Q. Mrs. Johnson, in your experience if a case is taken to arbitration, what are the range of choices [269] and decisions that the arbitrator might make, or does he have alternatives when he hears the case?

A. Yes, the arbitrator has a number of alternatives: he could have—if he had been able—if an arbitrator had heard this case and both sides presented as they're doing here to you ladies today, he had one decision: he could have reinstated Mr. Bowen with full rights, which means seniority, holiday pay, vacation, etc. And also his full salary. Or he could have reinstated Mr. Bowen with full rights as far as seniority and partial payment of his salary and other benefits. Or he could have denied Mr. Bowen the right to have the job with the Postal Service.

Q. Mrs. Johnson, if you had taken this case to arbitration, and the issue had been put up to the arbitrator whether or not Mr. Bowen was discharged for just cause,

do you have an opinion whether or not you would have expected to win this arbitration for Mr. Bowen or lose it?

MR. JACOBSOHN: Objection, Your Honor, unless there is some background as to what arbitrator we are discussing or whether or not we have any commonality, the witness cannot make any determination. We're talking apples and oranges, and—

[270] THE COURT: Well, I'm going to ask her to limit it solely though as to what she read from the file.

A. From what I read from the file—

MR. JACOBSOHN: My objection is to her speaking for an arbitrator—

THE COURT: Well, she really can't speak for an arbitrator. Let's ask her this question—I mean what she thinks the chances of winning it would be before an impartial arbitrator based on her experience as a—

MR. JACOBSOHN: In front of her impartial arbitrator, or one that we have as a panelist?

THE COURT: Oh no, no, no.

You advise your clients all of the time the chances of winning or losing. I'll ask her to—I'll permit her to answer what she thinks the chances of winning would have been before an impartial arbitrator.

BY MR. HARRIS:

Q. Mrs. Johnson?

A. The answer to that question, in my opinion, is that Mr. Bowen would now be working for the U.S. Postal Service. I think he had a very good chance of winning this grievance.

MR. HARRIS: Thank you, Mrs. Johnson, if you [271] would answer the questions of Mr. Gersh.

A. Mr. Gersh?

Q. Yes, ma'am.

A. Okay, thank you.

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[296] BY MR. JACOBSOHN:

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